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No. .....

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In the Supreme Court of the United States

October Term, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

v.

CARSON-TRUCKEE WATER CONSERVANCY, DISTRICT, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Should a decision of the Ninth Circuit Court of Appeals be allowed to stand which:

(1) Undermines the intent of Congress of encouraging private enforcement of federal environmental legislation by applying, in conflict with this Court's decision in *Ruckelshaus v. Sierra Club*, — U.S. —, 103 S.Ct. 3274 (1983), a "substantial, exceptional contribution" test as a basis for denying an award of attorney's fees to a prevailing party in litigation under the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.* (ESA)?

(2) Imposes a more restrictive standard on awards of attorney's fees to parties prevailing in litigation under the ESA and other federal environmental laws than that imposed for fee awards under federal civil rights laws when in fact Congress intended and this Court has held that a broader standard apply?

PARTIES TO THE PROCEEDING

Petitioner is the Pyramid Lake Paiute Tribe of Indians. Respondents are the Carson-Truckee Water Conservancy District, Sierra Pacific Power Company and the State of Nevada. The Secretary of the Interior, while designated Defendant-Appellee in the appeal to the Ninth Circuit Court of Appeals, did not actively participate in the appeal. Accordingly, Petitioner believes the Secretary has no interest in the outcome of the petition.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITITES	iv
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	2
JURISDICTION	2
STATUTE TO BE CONSTRUED	3
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
I. The Decision Of The Ninth Circuit That A Prevailing Party Must Nonetheless Prove Its Substantial, Exceptional Contribution To The Enforcement Of The Endangered Species Act Before Recovering Attorney's Fees Under That Act Raises Important Questions Of Federal Law And Frustrates The Congressional Intent Of Encouraging Private Enforcement Of Federal Environmental Legislation.	9
II. The Decision Of The Ninth Circuit Denying The Tribe Attorney's Fees Conflicts With This Court's Decision In *Ruckelshaus v. Sierra Club* And With Decisions Of Other Circuit Courts of Appeals.	13
A. *The Ninth Circuit's Decision Conflicts With This Court's Decision In Ruckelshaus v. Sierra Club By Requiring A Prevailing Party To Make a Showing Of Its Substantial Contribution Before Recovering Attorney's Fees.*	13

TABE OF CONTENTS—Continued

Page

B. *The Ninth Circuit's Decision Conflicts With Decisions Of Other Circuits Relating To Fee Awards In Environmental Litigation.* 19

III. The Decision Of The Ninth Circuit Must Be Reviewed Because Of Its Inconsistency With Decisions Of This Court Interpreting The Attorney's Fees Provisions Of Federal Civil Rights Laws 21

A. *The Fees Provisions Of The Federal Civil Rights Laws Are Similar To But More Restrictive Than The Fees Provision Of The Endangered Species Act.* 21

B. *Accordingly, the Ninth Circuit Decision In This Case Conflicts With Decisions Of This Court Interpreting Fees Provisions Of Federal Civil Rights Laws By Imposing A More Restrictive Standard Of Recovery On Prevailing Parties.* 22

CONCLUSION 24

Appendix A ..... App. 1

Appendix B ..... App. 8

Appendix C ..... App. 17

TABLE OF AUTHORITIES

CASES

Alabama Power Company v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982) 8, 17, 18, 19

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) 22

Carson-Truckee Water Conservancy District v. Watt, 537 F.Supp. 106 (D. Nev. 1982) (*CTWCD I*) ... 3

TABLE OF AUTHORITIES—Continued

	Page
Carson-Truckee Water Conservancy District v. Watt, 549 F.Supp. 704 (D. Nev. 1982) (*CTWCD II*)	5
Carson-Truckee Water Conservancy District v. Watt, 575 F.Supp. 467 (D. Nev. 1983) (*CTWCD III*)	2, 8
Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984) (*CTWCD IV*)	7
Carson-Truckee Water Conservancy District v. Secretary of the Interior, 748 F.2d 523 (9th Cir. 1984) (*CTWCD V*)	2, 8, 14
Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Company, 62 F.R.D. 353 (D. Del. 1974), *affirmed Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Company*, 510 F.2d 969 (3d Cir. 1975)	20
Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42 (D.C. Cir. 1982)	10, 18, 19, 23
Hensley v. Eckerhart, 461 U.S. 424 (1983)	14
Lummi Indian Tribe v. Oltman, 720 F.2d 1124 (9th Cir. 1983)	13
Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (1st Cir. 1973)	11
Nevada v. United States, 463 U.S. 110 (1983)	4
New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980)	22
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)	22, 23
Pyramid Lake Paiute Tribe of Indians v. Morton, 453 F.Supp. 252 (D.D.C. 1973)	4

TABLE OF AUTHORITIES—Continued

Page

Pyramid Lake Paiute Tribe of Indians v. Morton, 360 F.Supp. 669 (D.D.C. 1973) 4

Ruckelshaus v. Sierra Club, — U.S. —, 103 S.Ct. 3274 (1983) 8, 10, 13, 14, 15, 16, 17, 20, 22, 24

Save Our Sound Fisheries Ass'n v. Callaway, 429 F.Supp. 1136 (D.R.I. 1977) 23

Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982) 8, 14, 19, 20

Tennessee Valley Authority v. Hill, 437 U.S. 153 (1978) 11

United States v. Alpine Land and Reservoir Co., 431 F.2d 763 (9th Cir. 1970), *cert. denied sub nom., Pyramid Lake Paiute Tribe of Indians v. United States*, 401 U.S. 909 (1971) 4

Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982) 11, 18, 19, 20, 22, 23

FEDERAL LEGISLATION

Civil Rights Act of 1964, Title II, 42 U.S.C.2000a-3(b) 21

Civil Rights Act of 1964, Title VII, 42 U.S.C. § 2000e-5(k) 21

Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988 21

Clean Air Act, 42 U.S.C. § 7607(f) 8, 9

Clean Water Act, 33 U.S.C. § 1365(d) 9

Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c) 10

Deepwater Port Act, 35 U.S.C. § 1515(d) 10

Endangered Species Act of 1973, 16 U.S.C. §§ 1531 *et seq.* 11

TABLE OF AUTHORITIES—Continued

Page

Endangered Species Act of 1973, 16 U.S.C. §§ 1536 (a) (1), (z) (2) 5

Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(1) 12

Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4) ..... passim

Energy Policy and Conservation Act, 42 U.S.C. § 6305(d) 10

Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1415(g)(4) 23

Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E) 10

Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g)(4) 10

Noise Control Act, 42 U.S.C. § 4911(d) 10

Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(d) 10

Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5) 10

Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(d) 10

Safe Drinking Water Act, 42 U.S.C. § 300j-8(d) 10

Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270(d) 9

Toxic Substances Control Act, 15 U.S.C. § 2618(d) 9, 10

Washoe Reclamation Project Act of 1956, Pub. L. No. 84-858, 70 Stat. 775, 43 U.S.C. §§ 614-614d 3

28 U.S.C. § 1254 (1) 2

28 U.S.C. § 2101(e) 2

28 U.S.C. § 2412(b) 10

TABLE OF AUTHORITIES—Continued

Page

LEGISLATIVE MATERIALS

H.R. Rep. No. 294, 95th Cong., 1st Sess. 337 (1977) ... 11

H.R. Rep. No. 361, 92d Cong., 1st Sess. 23 (1971) ... 23

H.R. Rep. No. 412, 93rd Cong., 1st Sess. 19 (1973) ... 11

H.R. Rep. No. 14032, 94th Cong., 2d Sess., § 19(c)(3) (1976) ... 17

Legislative History of the Toxic Substances Control Act (1976) ... 12, 18

S. Rep. No. 451, 92d Cong., 1st Sess. 23 (1971) ... 23

S. Rep. No. 3149, 94th Cong., 2d Sess. § 19(c)(3) (1976) ... 17

OTHER AUTHORITIES

Rule 20 of the Rules of the Supreme Court of the United States ... 2

Rule 24(a), Federal Rules of Civil Procedure ... 3

Rule 29(1) of the Rules of the Supreme Court of the United States ... 2

Sutherland, *Statutory Construction* (4th ed. 1973 by C.D. Sands) ... 21

No. _____

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Pyramid Lake Paiute Tribe of Indians respectfully prays that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in *Carson-Truckee*

Water Conservancy District v. Secretary of the Interior, No. 83-2542, entered on November 28, 1984.

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OPINIONS BELOW

The opinion of the United States District Court for the District of Nevada is reported as *Carson-Truckee Water Conservancy District v. Watt*, 575 F.Supp. 467 (D. Nev. 1983), and is attached to this petition as Appendix A. The opinion of the Ninth Circuit Court of Appeals is reported as *Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523 (9th Cir. 1984), and is attached to this petition as Appendix B.

—o—

JURISDICTION

The opinion of the Ninth Circuit Court of Appeals was dated and filed on November 28, 1984. The judgment sought to be reviewed was entered on the same date. Jurisdiction to review the Court of Appeals' judgment in this civil case by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1254(1). This petition for writ of certiorari is filed within the 90-day period prescribed by 28 U.S.C. § 2101(c), as computed in accordance with Rule 20 and 29(1) of the Rules of the Supreme Court of the United States.

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STATUTE TO BE CONSTRUED

The decision below construed the attorney's fee provision of the Endangered Species Act of 1973, 16 U.S.C. § 1540(g)(4), which provides:

> (4) The Court, in issuing any final order brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate.

STATEMENT OF THE CASE

The Carson-Truckee Water Conservancy District, Sierra Pacific Power Company and the State of Nevada (hereinafter "Carson-Truckee") brought suit in the United States District Court for the District of Nevada in 1976 to compel the Secretary of the Interior to sell water from Stampede Reservoir for municipal and irrigation purposes. *Carson-Truckee Water Conservancy District v. Watt*, 537 F.Supp. 106 (D. Nev. 1982) (*CTWCD I*). Stampede Dam and Reservoir are Bureau of Reclamation projects on the Truckee River in Nevada constructed under the Washoe Reclamation Project Act of 1956. Pub. L. No. 84-858, 70 Stat. 775, 43 U.S.C. §§ 614-614d. The Truckee River below Stampede empties into Pyramid Lake which is entirely within the exterior boundaries of the Pyramid Lake Paiute Indian Reservation.

The Tribe filed a motion to intervene as a matter of right in 1976.[1] The Tribe alleged, first, that as beneficial

[1]Rule 24(a), Federal Rules of Civil Procedure.

or equitable owner of rights to the use of waters of the Truckee River and pursuant to its reserved "Winters Doctrine" rights[2] it had a substantial interest in the subject matter of the litigation. Second, the Tribe asserted that based on a history of litigation on related matters it did not believe its interests were fully or adequately represented by the Secretary.[3] Intervention as a matter of right was granted the Tribe in 1977.

One of the primary defenses raised by the Tribe was that the Secretary was precluded from selling water to Carson-Truckee by the Endangered Species Act. The Truckee River contains two species of fish—the cui-ui and the Lahonton cutthroat trout—which are classified as endangered or threatened under the ESA.[4] For several years the Tribe has sought to protect the fish population of the Truckee River to establish a commercial fishery in fulfillment of its rights recognized by treaty with the United States.

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[2]Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252, 264-5 (D.D.C. 1973).

[3]See Pyramid Lake Paiute Tribe of Indians, *supra,* 354 F. Supp. 252; and at 360 F.Supp. 669 (D.D.C. 1973); United States v. Alpine Land and Reservoir Co., 431 F.2d 763 (9th Cir. 1970), *cert. denied sub nom.,* Pyramid Lake Paiute Tribe of Indians v. United States, 401 U.S. 909 (1971). The conflict of interest inherent in the Department of the Interior's responsibilities through the Bureaus of Reclamation and Indian Affairs in the context of Indian water rights has been recognized and articulated by this Court in a case involving essentially the same litigants as here. *See* Nevada v. United States 463 U.S. 110 (1983).

[4]The Secretary of the Interior declared the cui-ui an endangered species in 1967, 32 *Fed. Reg.* 4001; and the Lahonton cutthroat trout to be "threatened with extinction" in 1975, 40 *Fed. Reg.* 29863.

Neither Carson-Truckee nor the Secretary disputed the priority of the government's obligations under the ESA to protect these threatened and endangered species of fish. The dispute focused instead on whether the ESA required the Secretary to operate Stampede Reservoir under a "jeopardy" or a "conservation" standard. In other words, the legal question was whether the Secretary's obligations were more accurately defined by § 7(a)(1) or § 7(a)(2) of the ESA. 16 U.S.C. §§ 1536(a)(1), (a)(2). *Carson-Truckee Water Conservancy District v. Watt,* 549 F.Supp. 704, 708-9 (D. Nev. 1982) (*CTWCD II*).

Under the former standard, advocated by Carson-Truckee, the Secretary need only supply that amount of water necessary to prevent extinction of the species. *Id.* at 708. Under the "conservation" standard, espoused by the Secretary and the Tribe, the Secretary's obligation was to "replenish the species so that they are no longer endangered or threatened with extinction." *Id.* at 708-9.

On the merits, the district court held that the ESA required the Secretary to operate Stampede giving priority to the fishery over all other puurposes until the cui-ui and Lahonton cutthroat trout were removed from the protected class as endangered and threatened species. *CTWDC II,* 549 F.Supp. at 706-08. Thus the court adopted the plan for operating Stampede under a conservation standard, rejecting Carson-Truckee's jeopardy standard. *Id.*[5]

The Tribe's claim that its interests were not adequately represented and protected by the Secretary was

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[5]The court noted that Carson-Truckee's proposal "does not meet their own standards because it would jeopardize the existence of the cui-ui and hasten their extinction." *Id.* at 711.

borne out several times during and following the litigation. While in trial, the Interior Department published in the *Federal Register* a notice of intent to sell water from Stampede Reservoir for municipal and irrigation purposes. *See* 46 *Fed. Reg.* 26705 (May 14, 1981). This notice completely contradicted the Secretary's position on the merits that his obligations both as trustee to the Tribe and under the ESA precluded the sale of any water for M & I purposes. *Id.* at 708.

The Secretary also filed a motion to amend the final judgment on the merits on November 5, 1982, to allow the Secretary greater discretion to operate Stampede than the district court had ordered. What the Secretary sought in effect was to amend the judgment to allow operation of Stampede under a § 7(a)(2) jeopardy standard, the standard espoused by Carson-Truckee and rejected by the court. The Tribe opposed the motion on the ground that the jeopardy plan had already been found by the court to hasten the extinction of the protected species of fish, arguing that the motion was nothing more than a cleverly disguised attempt to subvert the litigation. The district court ultimately denied the motion on December 22, 1982.

Finally, as a reflection of the continuing intransigence of the Interior Department, following the district court's decision the Interior Associate Solicitor for Conservation and Wildlife issued a memorandum to the Director of the U.S. Fish and Wildlife Service on September 7, 1983, recommending a national policy of "nonacquiescence" to the decision and order, stating that it is "not precedent setting and should be applied only to the Stampede Reservoir case." *See* Interior Department memorandum attached hereto as Appendix C, App. 18.

With respect to the substantive legal issue decided by the district court the memorandum concluded:

> In short, the district court in the *Carson* case should have upheld the discretionary authority of the Bureau of Reclamation to allocate Stampede Reservoir waters for endangered species conservation purposes and left it at that. As a matter of law, no one conservation regime should be considered favored or mandated as opposed to another. The attempt of the district court to mandate a particular program represents an unwarranted limitation of the discretionary conservation authorities granted to federal agencies. A clarification of these matters should thus be sought on appeal.

Appendix C, App. 28-9.

These issues were raised on appeal, but with no success. The Ninth Circuit Court of Appeals affirmed the case on the merits on all grounds. *Carson-Truckee Water Conservancy District v. Clark,* 741 F.2d 257 (9th Cir. 1984) *(CTWCD IV).*

Moreover, the Tribe was actively involved in the case since the beginning. Much of the government's discovery work was in fact initiated and carried out by the Tribe. The Tribe prepared all the interrogaties and served as lead counsel in all the depositions of plaintiffs' witnesses, as well as preparing and filing all pretrial procedural and discovery-related motions. The Tribe played a very active role in the trial of the case not only in the presentation of witnesses but in the cross-examination of adverse witnesses. Finally, the Tribe took the lead in the submission of briefs and did the majority of work on behalf of defendants.

Following the district court's decision on the merits, the Tribe moved for costs, expert witness fees and attor-

ney's fees. The court first granted the motion yet limited the recovery of costs and fees to work related to the issues under the ESA. Later the court became concerned about whether an award of attorney's fees was appropriate in this instance under the citizen suit provision of the ESA, and denied all requested fees outright. *Carson-Truckee Water Conservancy District v. Watt*, 575 F.Supp. 467, 470 (D. Nev. 1983) (*CTWCD III*).

The Tribe appealed the denial of fees, arguing that this Court's decision in *Ruckelshaus* establishes that a prevailing party on the merits is entitled to an award of fees absent exceptional or unusual circumstances. Moreover, the Tribe alleged that the district court erred by applying a test which the Court of Appeals for the District of Columbia had articulated in the context of *non-prevailing* or losing parties applying for fee awards under the Clean Air Act, 42 U.S.C. §§ 7401 *et seq.*[6] Under that standard a losing party would be entitled to an award of fees only if its contribution to the enforcement and implementation of a federal environmental statute were substantial and exceptional. Because it prevailed on the merits the Tribe asserted that standard should not apply.

The Ninth Circuit rejected the Tribe's contention that the substantial, exceptional contribution standard applied only to losing parties and rejected the Tribe's entitlement to attorney's fees as a prevailing party under the *Ruckelshaus* decision. *Carson-Truckee Water Conservancy District v. Secretary*, 748 F.2d 523 (9th Cir. 1984) (*CTWCD V*).

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[6]Alabama Power Company v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982); Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982).

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Ninth Circuit That A Prevailing Party Must Nonetheless Prove Its Substantial, Exceptional Contribution To The Enforcement Of The Endangered Species Act Before Recovering Attorney's Fees Under That Act Raises Important Questions Of Federal Law And Frustrates The Congressional Intent Of Encouraging Private Enforcement Of Federal Environmental Legislation.

Under the attorney's fees provision of the ESA a court has the discretion to award fees to any party when such an award is deemed appropriate. The attorney's fees provision of the ESA literally provides that:

> [t]he Court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to *any party, whenever the court determines such an award is appropriate.* (Emphasis added.)

16 U.S.C. § 1540(g)(4).

This standard for awarding attorney's fees has been widely used by Congress in federal environmental legislation adopted over the past one and one-half decades. Seventeen federal environmental statutes—including § 1540 (g)(4) of the ESA—contain identical fee provisions, most notably the citizen suit provisions of the Clean Air and Water Acts.[7]

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[7]Clean Air Act, 42 U.S.C. § 7607(f); Clean Water Act, 33 U.S.C. § 1365(d). The remaining fourteen identical statutory fee provisions include: Toxic Substances Control Act, 15 U.S.C. § 2618(d); Surface Mining Control and Reclamation Act, 30

(Continued on next page)

Congress' adoption and use of the "any party . . . whenever appropriate" standard in the fee provisions of these federal environmental laws represented a significant departure from and expansion of the circumstances under which fees awards would be made. As compared to awards in other contexts, "it seems plain that Congress intended to give the Courts greater latitude" in making fee awards. *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 48 (D.C. Cir. 1982).[8] Recently, this Court in *Ruckelshaus v. Sierra Club*, — U.S. —, 103 S.Ct. 3274 (1983), interpreted the fees provision of the Clean Air Act *and* the sixteen other identical fees provision as an expansion of fee awards over other contexts. *Ruckelshaus v. Sierra Club, supra*, 103 S.Ct. at 3275-6, n.1; *see* also 103 S.Ct. at 3279.

Through the enactment of comprehensive federal environmental legislation during the 1970's Congress expressly recognized the inherent value to society at large of the protection and enhancement of a clean environment. In the context of the ESA, Congress specifically noted the importance of all species of flora and fauna to the

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U.S.C. § 1270(d); Deep Seabed Hard Mineral Resources Act, 30 U.S.C. § 1427(c); Marine Protection, Research and Sanctuaries Act, 33 U.S.C. § 1415(g) (4); Deepwater Port Act, 33 U.S.C. § 1515(d); Safe Drinking Water Act, 42 U.S.C. § 300j-8(d); Noise Control Act, 42 U.S.C. § 4911(d); Energy Policy and Conservation Act, 42 U.S.C. § 6305(d); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8435(d); Ocean Thermal Energy Conversion Act, 42 U.S.C. § 9124(d); and Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a) (5).

[8]Comparing awards under the fees provision of the Toxic Substances Control Act, 15 U.S.C. § 2618(d), the Freedom of Information Act, 5 U.S.C. § 552(a) (4) (E) and 28 U.S.C. § 2412(b).

future of mankind, and of taking measures necessary to protect and preserve these species and their habitats. 16 U.S.C. § 1531. This Court has reviewed the legislative history of the ESA and concluded that Congress found the value of endangered species to be "incalculable." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187 (1978).

Yet Congress knew that, because of the complexity of issues related to the protection of the environment and the enormity of the task, enforcement and implementation of these laws could not be met by federal agencies alone.

> [T]he purposes of the authority to award fees are not only to discourage frivolous litigation, *but also to encourage litigation which will assure proper implementation and administration of the act or otherwise serve the public interest.* (Emphasis added.)

H.R. Rep. No. 294, 95th Cong., 1st Sess. 337 (1977).[9]

> The purpose of an award of costs and fees is not mainly punitive. It is to allocate the costs of litigation equitably, to encourage the achievement of statutory goals. When the government is attempting to carry out a program of such vast and unchartered dimensions, there are roles for both the official agency and a private watchdog.

Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331, 1338 (1st Cir. 1973) (interpreting the fees provision of the Clean Air Act).

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[9]Because of Congress' use of identical language in the fees provisions of these federal environmental statutes one can legitimately gain an understanding of congressional intent with respect to one act by reference to the legislative history of another. For example, the legislative history of the ESA indicates that its "language is parallel to that contained in the recent Marine Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in that same fashion." H.R. Rep. No. 412, 93rd Cong., 1st Sess. 19 (1973), *quoted in* Village of Kaktovik v. Watt, 689 F.2d 222, 224, n.14 (D.C. Cir. 1982).

Indeed, the specific language of the citizen suit provision of the ESA provides for actions "to enjoin any person, including the United States and any other governmental instrumentality or agency" from violations of the Act. 16 U.S.C. §1540(g)(1). Congress anticipated that at times private enforcement of the ESA would be necessary against other private parties and even the federal government and its agencies and instrumentalities. The liberal fees provision of the ESA thus must be interpreted within that context.

The present case represents the classic type of private enforcement intended and encouraged by Congress. Although the Tribe intervened in the lawsuit as a defendant, its interests were consistent with and in fact prevented further extinction of the threatened and endangered fish populations in the Truckee River.[10] And while at first blush it may appear that the Tribe's intervention was unnecessary and duplicative because the federal government also advocated a conservation standard under the ESA, such was clearly not the case. As discussed earlier, both advocated the adoption of a conservation standard under the ESA. Yet in practical terms what the Secretary sought under that standard was significantly different from what the Tribe sought and would have resulted in a much different management scheme to the detriment of the fishery. The Secretary's plan—different from the

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[10]Congress intended by using the phrase "any party" to encourage the enforcement of federal environmental laws, regardless of whether the party seeking its enforcement was a defendant or an intervenor or otherwise. *See* remarks of Senator Tunney, *Legislative History of the Toxic Substances Control Act* at 136, 727-28 (1976).

Tribe's — was ultimately rejected by the district court. *See* discussion, *supra*.

The Tribe's active involvement throughout the litigation ultimately resulted in the type of private enforcement and implementation of the ESA anticipated by Congress, and should be the basis for recovery of a fee award.

By denying the Tribe attorney's fees, the Ninth Circuit's decision will in the future have a chilling effect upon the private enforcement of the ESA and the sixteen other environmental laws with identical fees provisions. Congress clearly did not intend to foist upon prevailing or partially prevailing parties in environmental lawsuits the added burden of demonstrating the substantial nature of their contribution, in a separate proceeding or otherwise, after litigating the merits of a case. In all but the most exceptional of circumstances that contribution would, by definition, be established by virtue of a party's prevailing status.

II. The Decision Of The Ninth Circuit Denying The Tribe Attorney's Fees Conflicts With This Court's Decision In Ruckelshaus v. Sierra Club And With Decisions Of Other Circuit Courts of Appeals.

A. The Ninth Circuit's Decision Conflicts With This Court's Decision In Ruckelshaus v. Sierra Club By Requiring A Prevailing Party To Make A Showing Of Its Substantial Contribution Before Recovering Attorney's Fees.

In its decision the Ninth Circuit held that the Tribe, a prevailing party by standards articulated in that Circuit[11]

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[11]Lummi Indian Tribe v. Oltman, 720 F.2d 1124, 1125 (9th Cir. 1983).

and by this Court,[12] was nonetheless not entitled to an award of attorney's fees for its work in litigating important issues under the ESA. *CTWCD V*, *supra*, 748 F.2d at 525.

The decision below conflicts with the standards announced in *Ruckelshaus v. Sierra Club*, *supra*. This Court in *Ruckelshaus* rejected a fee award to a party which did not prevail on any litigated claims under the Clean Air Act. While foreclosing fee awards to losing parties, however, the Court reasoned that Congress intended prevailing and partially prevailing parties under federal environmental laws to receive attorney's fees *absent* exceptional circumstances. Thus the decision in *Ruckelshaus* rejects the holding of the Ninth Circuit in the instant case that prevailing parties must nonetheless be forced to demonstrate the substantial or exceptional nature of their contribution to litigation before receiving fee awards.[13]

In *Ruckelshaus* this Court reversed a decision by the Court of Appeals for the District of Columbia in *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982). There the court awarded attorney's fees to the Sierra Club and the Environmental Defense Fund, despite rejecting all claims on the merits, on the grounds that such an award was

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[12]A party is considered to have prevailed "for attorney's fees purposes if they succeed on any significant issue in litigation which achieves some of the benefit which the part[y] sought in bringing suit." Hensley v. Eckerhart, 461 U.S. 424, 433 (1983).

[13]While the application for attorney's fees in Ruckelshaus was made only under the Clean Air Act, the Court made clear that its interpretation of when fee awards were "appropriate" would also control fee applications under identical federal environmental laws, including the ESA. Ruckelshaus v. Sierra Club, supra, 103 S.Ct. at 3275-6, n.1. Thus the Court's interpretation is controlling in the instant case.

appropriate due to the substantial nature of their contribution to the implementation and enforcement of the Clean Air Act. *Id.* at 39-41.

Rejecting that reasoning, this Court in *Ruckelshaus* held that Congress, by using the phrase "may award [attorney's fees] . . . to any party, . . . whenever appropriate," intended to expand fee awards only to include *partially* prevailing parties.

> Section 307(f) was meant to expand the class of parties eligible for fee awards from prevailing parties to *partially prevailing* parties—parties achieving *some success*, even if not major success. Put differently, by enacting § 307(f), *Congress intended to eliminate both the restrictive readings of "prevailing party" adopted in some of the cases cited above and the necessity for case-by-case scrutiny by federal courts into whether plaintiffs prevailed "essentially" on "central" issues.* (Emphasis in original and added.)

Ruckelshaus v. Sierra Club, supra, 103 S.Ct. 3279.

The issue which affects prevailing litigants in light of the Ninth Circuit's decision in the instant case is the extent to which they are now required to relitigate requests for attorney's fees after prevailing or "showing some success" on the merits. The Ninth Circuit's fundamental flaw lies in its failure to recognize that Congress intended in cases such as the present one to avoid lengthy, complex and time-consuming inquiries into the substance of a prevailing party's contribution, a fact readily observed by this Court in *Ruckelshaus* (*see* preceding quotation).

Thus, in addition to the chilling effect on private enforcement of federal environmental law, the decision of the Ninth Circuit will result in an unnecessary commitment of

limited judicial resources and further uncertainty as to when prevailing parties are entitled to attorney's fees. Such unmanageable results have before received the scorn of this tribunal.

> In systemic terms, attorney's fee appeals take up lawyers' and judges' time that could more profitably be devoted to other cases, including the substantive civil rights claims that § 1988 was meant to facilitate. Regular appellate scrutiny of issues like those in this case also generates a steady stream of opinions, each requiring yet another to harmonize it with the one before or the one after. Ultimately, § 1988's straightforward command is replaced by a vast body of artificial, judge-made doctrine, with its own arcane procedures, which like a Frankenstein's monster meanders its well-intentioned way through the legal landscape leaving waste and confusion (not to mention circuit-splits) in its wake. Within the confines of individual cases, from prevailing plaintiffs' point of view, appellate litigation of attorney's fee issues increases the delay, uncertainty, and expense of bringing a civil rights case, even after the plaintiffs have won all the relief they deserve. *Hensley v. Eckerhart, supra,* 461 U.S. at 455-6 (Brennan, J., concurring in part and dissenting in part).

As a prevailing party the Tribe intends by this petition to eliminate the waste and confusion invited upon the legal landscape by the Ninth Circuit's decision.

Significantly, in practical terms the result in *Ruckelshaus* will not divest trial courts of the discretion to deny fee awards to prevailing parties in clearly inappropriate circumstances. As the Court there noted:

> Of course, we do not mean to suggest that trivial success on the merits, or purely procedural victories, would justify an award of fees under statutes setting out the "when appropriate" standard. Rather, Con-

> gress meant merely to avoid the necessity for lengthy inquiries into the question whether a particular party's success was "substantial" or occurred on a "central issue."

Ruckelshaus v. Sierra Club, supra, 103 S.Ct. 3279, n.9.[14]

Such was not the case here, however. The Tribe was an active participant in the litigation from the outset, investing a substantial amount of time and resources on legal and other expert witness fees both in the pre-trial discovery phase and at trial. As described *supra,* oftentimes the Tribe's interests were not in alignment with those of the United States. But for the Tribe's active involvement those interests would not have been adequately protected by the federal government. Thus the Tribe's involvement can scarcely be described as frivolous, parasitic or trivial.

This Court's reasoning in *Ruckelshaus* is also consistent with the intent of Congress that prevailing parties are entitled to recover attorney's fees. For example, Senator Tunney of California, a principal sponsor and proponent of many of the federal environmental laws referred to here, noted with particular relevance to this issue that "a successful plaintiff should ordinarily recover in [sic] attorneys' fee *unless special circumstances would render an award unjust.*" (Emphasis added.)[15]

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[14]In liberalizing fee awards to environmental litigants Congress sought to encourage private enforcement of federal environmental laws while at the same time protecting against abuse: to discourage frivolous litigation and "parasitic intervention by parties having nothing to add but eager to collect costs and fees." Alabama Power Company v. Gorsuch, 672 F.2d 1, 30 (D.C. Cir. 1982).

[15]S. Rep. No. 3149, 94th Cong., 2d Sess. § 19(c) (3) (1976); H.R. Rep. No. 14032, 94th Cong., 2d Sess. § 19(c) (3) (1976),

(Continued on next page)

Moreover, in a painstaking analysis of the legislative history of the fees provision of the Clean Air Act, Judge Wilkey, in *Alabama Power Company v. Gorsuch, supra* (dissenting on a separate issue), concluded that Congress clearly intended a prevailing party status to be a sufficient condition for the recovery of attorney's fees.

> It is fair to conclude that prevailing is not a necessary condition for the award of attorneys' fees and costs, though it is sufficient. Congress, that is, generally intended that an award be made when a petitioner prevailed, plus in some other instances as well.
>
> • • •
>
> If the idea is to encourage "legitimate actions," "proper implementation," or suits in the "public interest," an award to parties who prevail would seem to be required by the legislative history.

Alabama Power Company v. Gorsuch, supra, 672 F.2d at 13-14).

In sum, Congress did not intend nor has any court confronted with this question interpreted Congress as intending to impose a substantial contribution test upon prevailing parties before recovery of attorney's fees. Thus the decision of the Ninth Circuit represents an aberration which this Court should review and correct.

(Continued from previous page)

reprinted in *Legislative History of the Toxic Substances Control Act* at 136, 727-28 (1976); *quoted in* Environmental Defense Fund v. Environmental Protection Agency, *supra,* 672 F.2d at 49; also in Village of Kaktovik v. Watt, 689 F.2d at 225. Significantly, the court in Kaktovik limited those special circumstances where an award to a prevailing party would be unjust to situations where a suit was "filed for the sake of mere harassment." *Id.,* 689 F.2d at 224, n.14.

B. The Ninth Circuit's Decision Conflicts With Decisions Of Other Circuits Relating To Fee Awards In Environmental Litigation.

The decision in the present case, imposing the substantial contribution standard upon a prevailing party in litigation on the merits under the ESA, conflicts with earlier decisions of other courts of appeals.

The Court of Appeals for the District of Columbia does not impose a substantial contribution test upon prevailing parties. In *Environmental Defense Fund v. Environmental Protection Agency, supra,* the court awarded attorney's fees of $156,000.00 to the plaintiff environmental organization which prevailed in litigation challenging the validity of the EPA's regulations under the Toxic Substances Control Act, 15 U.S.C. § 2601 *et seq.*, governing the disposal, marking, manufacture, processing, distribution and use of polychlorinated biphenyls (PCB's).

No mention whatsoever was made of the substantial contribution test in the decision awarding attorney's fees. The court was satisfied that the plaintiff's prevailing on the merits was sufficient to entitle it to receive attorney's fees. This is especially significant in light of the fact that the decision came down the same day as two other decisions from the Court of Appeals for the District of Columbia imposing the substantial contribution test in cases where *losing* parties applied for attorney's fees. *Alabama Power Company, supra; Sierra Club v. Gorsuch, supra. See also Village of Kaktovik v. Watt, supra,* 689 F.2d at 228. The clear implication is that the Court of Appeals for the District of Columbia did not then and does not now consider

it necessary to impose a substantial contribution test on prevailing parties.

The Third Circuit Court of Appeals has also imposed the substantial contribution test only upon losing parties. *Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Company,* 510 F.2d 969 (3d Cir. 1975), *affirming Delaware Citizens for Clean Air, Inc. v. Stauffer Chemical Company,* 62 F.R.D. 353 (D. Del. 1974).[16]

In conclusion, it is abundantly evident that the decision of the Ninth Circuit in this case is squarely at odds with the decision in *Ruckelshaus,* and will result in unnecessary litigation over the circumstances under which prevailing parties are entitled to attorney's fees. Such a result was not intended by Congress when enacting the fees provision of the ESA and other federal environmental statutes, nor has it been imposed by other courts of appeals which have decided fee application cases.

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[16]There the district court stated that:

> "[A]ppropriate" should be read in the context of the pre-existing notions about the circumstances under which one party may fairly be required to bear his adversary's costs of litigation. In this context it seems to this Court that success or failure must be given substantial weight and that *an award of counsel fees to a losing party should be reserved for those cases in which either the litigation, though ultimately unsuccessful, serves the objectives of the Act in some substantial way or in which other exceptional circumstances tip the balance of the equities decidedly in the losing party's favor.* (Emphasis added.)

Citizens for Clean Air, Inc., *supra,* 62 F.R.D. at 355, *quoted in* Sierra Club v. Gorsuch, *supra,* 672 F.2d at 36, n.4; and Village of Kaktovik v. Watt, *supra,* 689 F.2d at 228.

III. The Decision Of The Ninth Circuit Must Be Reviewed Because Of Its Inconsistency With Decisions Of This Court Intepreting The Attorney's Fees Provisions Of Federal Civil Rights Laws.

A. The Fees Provisions Of The Federal Civil Rights Laws Are Similar To But More Restrictive Than The Fees Provision Of The Endangered Species Act.

By referring to other similar legislation and the decisions of courts interpreting that legislation a court can learn of and give effect to the true intent of Congress in subsequent legislation, thereby establishing a more uniform and harmonious system of law. Sutherland, *Statutory Construction* §§ 53.01, .03 (4th ed. 1973 by C. Sands). To that end, it is necessary and useful to analogize to the award of attorney's fees under the federal civil rights laws and of the decisions of this Court interpreting those fees provisions.

The attorney's fees provisions of both Title II and Title VII of the Civil Rights Act of 1964, and the Civil Rights Attorney's Fees Award Act of 1976, contain identical standards for the award of attorney's fees. All three provide that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." *See* 42 U.S.C. §§ 2000a-3(b); 2000e-5(k); and 42 U.S.C. § 1988.

The fees provisions of the federal civil rights and environmental laws are similar in that both make fee awards discretionary with the court considering the award. The major difference is with respect to the party receiving the award: in the civil rights context a party must prevail while in federal environmental litigation, includ-

ing litigation under the ESA, *any party* may receive fees when the court determines such an award is appropriate. Courts interpreting this distinction—including this Court—have interpreted congressional intent as liberalizing fee awards to prevailing environmental litigants. *See Ruckelshaus v. Sierra Club, supra*, 103 S.Ct. at 3279.

B. Accordingly, The Ninth Circuit Decision In This Case Conflicts With Decisions Of This Court Interpreting Fees Provisions Of Federal Civil Rights Laws By Imposing A More Restrictive Standard Of Recovery On Prevailing Parties.

In civil rights litigation, this Court has unequivocally stated that a prevailing party is entitled to an award of attorney's fees "unless special circumstances exist which would render an award unjust." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968). In interpreting this standard this Court has described a court's discretion to deny fees to a prevailing party under Titles II or VII as "narrow." *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 68 (1980). More recently this Court reaffirmed its holding in *Newman* that, in civil rights cases where counsel fees are allowed by Congress, the award should be made to the successful party "absent *exceptional* circumstances." (Emphasis added.) *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 262 (1975).

The Court of Appeals for the District of Columbia has analogized to the federal civil rights laws to determine appropriate circumstances under which to deny prevailing parties fee awards. As quoted earlier, the court in *Village of Kaktovik v. Watt, supra*, noted:

> ESA's equally limited history states that its "language is parallel to that contained in the recent Marine, Protection, Research and Sanctuaries Act of 1972, and is to be interpreted in the same fashion. H.R. Rep. No. 412, 93d Cong., 1st Sess. 19 (1973). *The history of the Act alluded to endorses awards where "the suit was meritorious, and not filed for the sake of mere harassment".* S. Rep. No. 451, 92d Cong., 1st Sess. 23 (1971); H.R. Rep. No. 361, 92d Cong., 1st Sess. 23 (1971). (Emphasis added.)

Village of Kaktovik v. Watt, supra, 689 F.2d at 224-25 n.14. *See also Environmental Defense Fund v. Environmental Protection Agency, supra,* 672 F.2d at 49, quoting the remarks of Senator Tunney that "a successful plaintiff should ordinarily recover in [sic] attorneys' fee unless special circumstances should render an award unjust."

This reasoning has also been adopted on several occasions by other lower courts considering fee awards under federal environmental laws. For example, in *Save Our Sound Fisheries Ass'n v. Callaway,* 429 F. Supp. 1136 (D.R.I. 1977), the court held that Congress' intent in enacting the attorney's fees provisions of the Federal Water Pollution Control Act of 1972, 33 U.S.C. § 1415(g)(4), and the Marine Protection, Research and Sanctuaries Act of 1972, 33 U.S.C. § 1415(g) (4), was to require attorney's fees awards to prevailing parties unless there was evidence of bad faith. *Save Our Sound Fisheries v. Callaway, supra,* 429 F. Supp. at 1145-46, *citing Newman v. Piggie Park Enterprises, supra.*

In summary, parallels exist between the standards for awarding attorney's fees to prevailing parties under the ESA and the federal civil rights laws. Yet Congress intended and this Court has clearly interpreted the fees

provisions in federal environmental laws to allow for an expansion of fee awards as compared to fee applications in the civil rights context. Accordingly, it is illogical and unsupportable for the Ninth Circuit to hold the Tribe, a prevailing party in the present case, to a higher, more restrictive standard than the standard under the federal civil rights laws.

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CONCLUSION

The Supreme Court in *Ruckelshaus* foreclosed the availability of attorney's fees to losing parties under the attorney's fee provision of the Clean Air Act and sixteen other federal environmental statutes, including Section 1540(g)(4) of the ESA. The Court held that a party which does not prevail at all on the merits is not entitled to a fee award. On the other hand, the Court held that a party seeking to enforce a statue which achieves some success on the merits is entitled to recover a fee award absent exceptional circumstances.

At issue in the present case is whether the Pyramid Lake Paiute Tribe, despite its status as a prevailing party, must nonetheless be required to make an independent showing that its contribution to the enforcement and implementation of the Endangered Species Act was exceptional and substantial before recovering attorney's fees. By requiring such a showing the Ninth Circuit's decision is fundamentally flawed and inconsistent with the intent of Congress, decisions of other courts of appeals, and of this Court in *Ruckelshaus*.

Moreover, the Ninth Circuit's decision is inconsistent with decisions of this Court interpreting the attorney's fees provisions of the federal civil rights laws, which call for awards to prevailing parties in all but exceptional circumstances. This inconsistency cannot be allowed to stand in light of the clear congressional intent to liberalize fee awards in environmental litigation as compared to fee awards in civil rights lawsuits.

For these reasons, this Court should grant the petition for certiorari to review the significant implications of the Ninth Circuit's decision below and reverse the judgment thereof with instructions to remand for determination of a reasonable fee.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

Civil No. R-76-152 GJS

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, et al.,

Plaintiffs,

vs.

JAMES G. WATT, Secretary of the Interior, et al.,

Defendants,

and

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Defendant-Intervenor.

OPINION

(Filed September 29, 1983)

SOLOMON, Judge:

On December 22, 1982, I granted the motion of defendant-intervenor, Pyramid Lake Paiute Tribe of Indians (Tribe), for costs, expert witness fees, and attorney fees limited to the issues under the Endangered Species Act (ESA).

Thereafter, the Tribe filed an application for fees in which it sought $545,292 in attorney fees and costs.

During my examination of the exhibits and briefs submitted in support of and in opposition to the requested award, I became concerned that an award of attorney fees, particularly of the size requested, was inappropriate under the facts of this case. I therefore requested argument on the propriety of my order granting fees, and also

on the issue of the amount of such fees if any were to be allowed.

On the basis of the oral arguments, written brief and my reexamination of the record, including briefs on attorney fees, I have concluded that an award of attorney fees to the Tribe in any amount would be inappropriate.

Plaintiffs Carson-Truckee Water Conservancy District, Sierra Pacific Power Company and the State of Nevada, filed this action in which they seek to appropriate water from the Lower Truckee River for municipal and industrial (M & I) purposes. They contend that the Secretary of the Interior (Secretary) and other federal defendants, by failing to obtain reimbursement for the costs of constructing Stampede Dam and Reservoir (Stampede), violated the Washoe Project Act and related reclamation laws.

The Government or the Tribe or both over a period of many years have filed a number of cases to obtain additional water for the Tribe. Some of these cases were decided against the Government and the Tribe, and others are still pending. One of these cases was recently decided by the Supreme Court of the United States. *Nevada v. United States*, — U.S. —, 103 S.Ct. 2906 (1983). There, the district court rejected the demand of the Government for reserve water rights for the Tribe for fishery purposes. The Court of Appeals partly reversed that decision. Later, the Court of Appeals' decision was reversed by the Supreme Court which held that res judicata prevents the United States and the Tribe from litigating their claims.

The Government in its answer to plaintiffs' complaint in this case, raised many issues as defenses including the defense of the ESA.

The Tribe filed a motion to intervene in this case asserting that it "has an interest in the subject matter of the action as the beneficial or equitable owner of the rights to the use of the waters of the Truckee River including those stored in Stampede Reservoir . . . ." The motion was granted. Thereafter, the Tribe made a number of legal contentions. First, the Tribe contended that the Government had trust obligations which made it improper to compel the Secretary to sell water which was subject to the reserve water rights claimed by the Government and the Tribe in *Nevada v. United States, supra.* Second, the Government cannot be compelled to sell water necessary to enable the Tribe to take advantage of Pyramid Lake fishery and to become economically self-sufficient. Third, the Secretary cannot be compelled to violate the existing court order in *Pyramid Lake Paiute Tribe of Indians v. Morton.* The Tribe also raised the defense of ESA.

In addition to these substantive defenses, the Tribe raised a number of technical defenses. They are:

> (1) Do plaintiffs have standing to challenge the Secretary's action?
>
> (2) Do the plaintiffs have a private right of action under the reclamation laws?
>
> (3) Is the government required to obtain a reimbursement contract? If so, can reimbursement be achieved through a contract to supply M&I water to the District?

These technical defenses were the basis for my opinion reported at 537 F. Supp. 106. My opinion discussed the technical issues raised by the Government and the Tribe and concluded with the following statement:

> I hold that the plaintiffs have standing to maintain this action, and that they have a private right of action under the Administrative Procedure Act to enforce the Secretary's reimbursement obligation. The Secretary is required to sell all of Stampede's water except that which is necessary to fulfill his trust obligations to the Tribe and to protect the endangered species which spawn in the Lower Truckee River.

In that opinion, I also denied the claim of the State of Nevada that "the Secretary needs a permit from the State of Nevada for Stampede's present operations."

I reserved decision on the amount of water the Secretary must provide (1) to satisfy his obligations under the ESA to conserve the endangered and threatened species of Pyramid Lake, and (2) to satisfy his trust obligations to preserve the Pyramid Lake fishery for the benefit of the Tribe.

All parties agreed that the Secretary has obligations under the ESA and under his trust obligations to the Tribe which take precedence over his obligations to store water for M & I uses. The only issue was the amount of water necessary to fulfill those obligations.

The evidence at the trial consisted primarily of the testimony of experts presented in written statements and exhibits submitted by all of the parties, particularly the plaintiffs and the Tribe. I found that there was substantial evidence to support the Secretary's plan for operating Stampede, to restore the qui-ui to a non-endangered sta-

tus, and to restore the Lahontan cutthroat trout to the point where it is no longer a threatened species.

I did not determine the amount of water necessary to satisfy the Tribe's fishery rights because the Supreme Court had not yet determined those rights in *Nevada v. United States.* I held it was not necessary to make that determination because all of that water will be necessary for many years to come for the qui-ui and the Lahontan cutthroat trout in order to remove them from their threatened or endangered status.

On the basis of my decision, the Tribe requested attorney fees not only from the plaintiffs but also from the Government. This application was made under the provisions of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.,* particularly section 1540(g)(4) which permits an award of attorney fees whenever the court determines such an award is appropriate. This is the only statute under which the Tribe can obtain attorney fees.

The Tribe participated in this action primarily for its own benefit; that is, to obtain water rights, to establish a fishery, and to require the Government to furnish it water in compliance with the Government's trust obligations. Nevertheless, the self-interests of the Tribe would not bar it from obtaining an award of attorney fees. But to obtain such an award, I believe it is imperative that the Tribe show that the litigation involved important, complex or novel issues, that the case aided in interpreting the Act, and that the Tribe's efforts substantially contributed to the goals of the ESA. "[T]he dominant consideration is whether litigation by that party has served the public interest by assisting the interpretation and implementation" of the statute. *Alabama Power Company v. Gorsuch,* 672

F.2d 1, 3 (D.C. Cir. 1982); *see also Sierra Club v. Gorsuch,* 672 F.2d 33 (D.C. Cir. 1982) and *Environmental Defense Fund v. Environmental Protection Agency,* 672 F.2d 42 (D.C. Cir. 1982).

I have concluded that this case will not substantially contribute to ESA goals. All parties conceded that the Secretary has obligations under the ESA which take precedence over his obligations to store water for M & I uses. The only ESA issue to be resolved, therefore, was the amount of water necessary to carry out the purposes of the Act. While this is important, it does not meet the standard set out in *Alabama Power v. Gorsuch* and the companion cases.

In addition, the Secretary had already commenced a program to help the qui-ui and Lahontan cutthroat trout. The Government had raised the defense of the ESA in its original answer and was actively and energetically participating in the trial of the case. The Tribe concedes that the counsel for the Government did a first-class job in defending the case, and that the Government made significant financial contributions towards its defense.

The Tribe entered the case primarily for its own economic self-interest. Most of the issues it raised, particularly those of a technical nature like the standing of the plaintiffs, were not intended to, nor did they, assist in the interpretation or implemention of the Act. In fact, some of these defenses, if they had been successful, would have had the opposite effect.

In light of all the facts, I have concluded that my earlier ruling granting attorney fees and costs for the Tribe's attorneys was ill-advised and should be vacated.

Plaintiffs interpret 16 U.S.C. § 1540(g)(1) to mean that costs, including attorney fees and expert witness fees, may be awarded to a party under 16 U.S.C. § 1540(g)(4) only when the party commences the action. Plaintiffs assert that here the Tribe did not commence the action but raised ESA as one of a number of defenses, and that as a matter of law the Tribe may not recover costs and attorney fees under ESA.

Although I do not read the statute that narrowly, it is unnecessary for me to decide this issue because I have now concluded that it is not appropriate to grant the Tribe costs and attorney fees.

DATED this 26th day of September, 1983.

/s/ Gus J. Solomon
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 83-2542
(D.C. No. CV R-76-152 GJS)

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT; SIERRA PACIFIC POWER COMPANY, a corporation; and STATE OF NEVADA,

Plaintiffs-Appellees,

vs.

SECRETARY OF THE INTERIOR, et al.,

Defendants,

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Defendant-Intervenor-Appellant.

Appeal from the United States District Court
for the District of Nevada

Honorable Gus J. Solomon, District Judge, Presiding
Argued and Submitted May 16, 1984

Before: DUNIWAY, SCHROEDER and NORRIS,
Circuit Judges

OPINION

(Filed November 28, 1984)

DUNIWAY, Circuit Judge:

The Pyramid Lake Paiute Tribe, having successfully intervened in the Water District's suit against the Secretary of the Interior, unsuccessfully sought attorney fees under the Endangered Species Act, 16 U.S.C. § 1540(g)(4). *Carson-Truckee Water Conservancy Dist. v. Watt,* D. Nev.,

1983, 575 F. Supp. 467, (*Carson-Truckee III*). The Tribe appeals, arguing that the court applied the wrong legal test to determine whether an award of attorney fees was "appropriate." We affirm.

I. FACTS.

The underlying suit is one of many, over the years, involving water rights in the Truckee river area of California and Nevada. The Water District, Sierra Pacific Power Company, and the State of Nevada sued officials of the Department of Interior, seeking to force sale of water impounded behind the Stampede Dam on the Little Truckee River under the Washoe Project Act, 43 U.S.C. § 614. Interior has used the water primarily to reestablish in Pyramid Lake two species of fish—the cui-ui fish, an endangered species, and the Lahontan cutthroat trout, a threatened species—whose survival other diversions of water from the Truckee system has imperiled. The Tribe, opposing the sale of water for municipal and industrial use in the Reno-Sparks area, intervened as a defendant in the suit.

In the first phase of the case, the district court rejected several of the Tribe's defenses, holding that Interior must sell the Water District whatever Stampede Dam water was not needed to fulfill trust obligations to the Tribe and to protect the fish. *Carson-Truckee Water Conservancy District v. Watt*, D. Nev. 2982 [sic], 537 F. Supp. 106, (*Carson-Truckee I*). In the second phase, the district court held that, under the Endangered Species Act, Interior must give species conservation priority over other purposes of Stampede Dam until the fish are no longer threatened. *Carson-Truckee Water Conservancy District*

v. Watt, D. Nev. 1982, 549 F. Supp. 704, (*Carson-Truckee II*). The district court also held that because the Endangered Species Act requirements controlled the outcome, Interior's trust obligations to the Tribe were not ripe for decision. *Id.* at 713. We recently reviewed these decisions on the merits. *Carson-Truckee Water Conservancy District v. Watt,* 9 Cir., 1984, 741 F.2d 257, (*Carson-Truckee IV*).

Meanwhile, the district court granted the Tribe's motion for costs, expert witness fees, and attorney fees for services related to the issues under the Endangered Species Act. Upon receiving the Tribe's application, however, the district court became concerned about whether an award of attorney fees, particularly tthe amount requested, was appropriate under the facts of the case. After hearing fresh argument, the district court concluded that an award of attorney fees to the Tribe in any amount was inappropriate. The Tribe appeals.

II. MERITS.

A. *Standard of Review.*

The Tribe argues that the district court applied the wrong legal standard in denying attorney fees to the Tribe. Such questions of law are freely reviewable on appeal. *Societe de Conditionment v. Hunter Engineering Co., Inc.,* 9 Cir., 1981, 655 F.2d 938; 941; *Miller v. United States,* 9 Cir., 1978, 587 F.2d 991, 994. However, if the district court applied the correct legal standard, we review attorney fees awards under the Endangered Species Act for abuse of discretion. *Cf. United States v. First Nat. Bank of Circle,* 9 Cir., 1984, 732 F.2d 1444, 1446.

B. *The Statute.*

The citizen suit provisions of the Endangered Species Act authorize attorney fees awards when "appropriate":

> The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, *whenever the court determines such an award is appropriate.*

16 U.S.C. § 1540(g)(4) (emphasis added).

C. *The Trial Court's Decision.*

The district court first stated the following standard:

> [T]o obtain such an award, I believe it is imperative that the Tribe show that the litigation involved important, complex or novel issues, that the case aided in interpreting the Act, and that the Tribe's efforts substantially contributed to the goals of the ESA. "[T]he dominant consideration is whether litigation by that party has served the public interest by assisting the interpretation and implementation" of the statute. *Alabama Power Company v. Gorsuch,* 672 F.2d 1, 3 (D.C. Cir. 1982); *see also Sierra Club v. Gorsuch,* 672 F.2d 33 (D.C. Cir. 1982); and *Environmental Defense Fund v. Environmental Protection Agency,* 672 F.2d 42 (D.C. Cir. 2982) [sic].

575 F. Supp. at 469.

D. *The Tribe's Argument.*

The Tribe offers a two-step argument. It argues, first, that the Court of Appeals for the District of Columbia devised a dual standard of "appropriateness" for statutes such as § 1540(g)(4), depending on whether the requesting party prevailed on the merits, and that in our

case the district court erroneously applied the non-prevailing party standard. It argues, second, that in a decision announced three months before the district court's decision, the Supreme Court held that non-prevailing parties are not eligible for attorney fees awards. *Ruckelshaus v. Sierra Club,* 1983, — U.S. — (slip op., July 1, 1983). Thus, says the Tribe, the Court abolished the non-prevailing party standard that the district court erroneously relied on. We think, however, that both steps of the argument are wrong.

First, the D.C. Circuit cases, *Alabama Power, Sierra Club,* and *Environmental Defense Fund, supra; see also Village of Kaktovik v. Watt,* D.C. Cir., 1982, 689 F.2d 222, 224-25, set forth no dual standard. These decisions held that, under the "when appropriate" standard (of the attorney fees provision of the Clear Air Act, 42 U.S.C. § 7607(f)), and similar provisions specifically including the Endangered Species Act, 16 U.S.C. § 1540(g)(4), courts could award attorney fees to non-prevailing parties as well as to prevailing parties. *See Ruckelshaus v. Sierra Club, supra,* — U.S. —, —, slip op. at 2 n.1; *Kaktovik,* 689 F.2d at 224 & n.14. These cases articulated "*one* standard for appropriateness, and that standard allows courts to award attorneys' fees to parties who have 'substantially contributed' to the goals of the . . . Act." *Sierra Club,* 672 F.2d at 42 n.10 (emphasis in the original). *See also id.* at 36: "the relevant inquiry is whether the litigation—successful or not—furthered the goals of the Act." The cases "made clear that whether the party claiming costs or fees has prevailed does not control the inquiry on appropriateness, and that the dominant consideration is whether litigation by the party has served the public interest by as-

sisting the interpretation or implementation of the . . . Act." *Alabama Power*, 672 F.2d at 3.

Although these cases involved non-prevailing parties, they noted that "even a prevailing or substantially prevailing party who does not substantially contribute to the goals of the . . . Act may not be entitled to attorneys' fees." *Sierra Club*, 672 F.2d at 38 n.8. "Although a complainant may have substantially prevailed in an action, the award of costs and attorney fees does not automatically follow. There are other factors which the court should consider in determining the appropriateness of an award of costs and attorney fees." *Id.* at 39 n.8, quoting *Cuneo v. Rumsfeld*, D.C. Cir., 1977, 553 F.2d 1360, 1365. *See also Roosevelt Campobello Intern. Park Comm. v. Environmental Protection Agency*, 1 Cir., 1983, 711 F.2d 431, 439-41 & n.15 (awarding fees for prevailing issues proportional to the extent of the party's contribution to the development of the issues, but not for non-prevailing issues, while noting that "success is, of course, not the only criterion"); *Kaktovik, supra*, 689 F.2d at 228 & n.44 ("while prevailing vel non is not to be a conclusive factor, it may be a relevant consideration" in determining whether a party's contribution is substantial); *Florida Power & Light Co. v. Costle*, 5 Cir., 1982, 683 F.2d 941, 943 (awarding fees to the prevailing party not automatically, but because result of suit will aid in the proper implementation and interpretation of the statute). We reject the Tribe's first argument, that the district court chose the wrong one of two standards.

As a second step, the Tribe argues that *Ruckelshaus*, in reversing the D.C. Circuit's decision in *Sierra Club* that nonprevailing parties are eligible for attorney fees, also eliminated the "substantial contribution" standard for

non-prevailing parties. The Tribe argues that the test of "appropriateness" under *Ruckelshaus* is simply whether the claimant achieved "some degree of success on the merits." *See Ruckelshaus,* slip op. at 13. Because the Tribe had some degree of success on the merits, it argues, it is entitled to an award of attorney fees as a matter of law. We disagree.

Ruckelshaus decided that it is not "appropriate" to award attorney fees to a party that achieved no success on the merits of its claims. Slip. op. at 2; *see Northern Plains Resource Council v. EPA,* 9 Cir., 1984, 734 F.2d 408. The Court held that Congress intended the "when appropriate" standard to permit awards to partially as well as fully prevailing parties. The Tribe invalidly infers from this holding that all parties who achieve some degree of success on the merits are not only eligible for, but are entitled to attorney fees. But *Ruckelshaus* dealt only with eligibility for, not with entitlement to, a statutory award. *See* slip op. at 10 n.11 (distinguishing permissive and mandatory statutory language); *Sierra Club,* 672 F.2d at 38 n.8 (distinguishing issues of eligibility and entitlement). Nothing in *Ruckelshaus* suggests that the Court meant to reject the rule that, under the "when appropriate" standard, an eligible party must make a substantial contribution to the goals of a statute to be entitled to attorney fees.

The Tribe further argues that the proper standard for awarding attorney fees to prevailing parties is the standard adopted under the attorney fees provision of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a-3(b), 2000e-5(k), and the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988. But while the D.C. Circuit cases involve attorney

fees provisions that are "identical" to 16 U.S.C. § 1540 (g)(4), *Ruckelshaus, supra,* slip op. at 2 n.1, the Civil Rights statutes involve the different "prevailing party" statutory standard, under which a prevailing plaintiff "should ordinarily recover an attorney's fees unless special circumstances would render such an award unjust," *Newman v. Piggie Park Enterprises, Inc.,* 1968, 390 U.S. 400, 402; but a prevailing *defendant* may get attorney fees only if the plaintiff's action was frivolous, meritless, or groundless, *Hughes v. Rowe,* 1980, 449 U.S. 5, 14-15. *See Ruckelshaus,* slip op. at 7-9. Because *Ruckelshaus* did not disapprove the D.C. Circuit standard for "when appropriate" statutes, but only its application to non-prevailing parties, the district court stated the correct standard.

E. *Application of the Standard.*

The district court stated its reasons for concluding that the Tribe's participation in this action did not substantially contribute to the goals of the Endangered Species Act. The issue under the Act was relatively narrow; the government had raised the issue before the Tribe intervened, and had energetically litigated the issue; and the Tribe raised defenses that were inconsistent with assisting in the interpretation or implementation of the Act. *Carson-Truckee III,* 575 F. Supp. at 469-70. We hold that the district court did not abuse its discretion.

F. *Posture of the Case.*

The attorney fees statute authorizes awards "in any suit brought pursuant to paragraph (1) of this subsection." 16 U.S.C. § 1540(g)(4). Paragraph (1) provides that "any citizen may commence a civil suit" against any

person or governmental entity that violates the Act, or against Interior to compel enforcement of the Act. *Id.* § 1540(g)(1). The Water District had argued that because this is not literally such a suit, the attorney fees provision does not apply. *See Roosevelt Campobello*, 711 F.2d at 440 (raising but not resolving this question). While indicating that it disagreed with the Water District's argument, the district court declined to decide the issue because it had concluded that an award was not appropriate. 575 F. Supp. at 470. We, too, decline.

Affirmed.

APPENDIX C

(SEAL)

UNITED STATES DEPARTMENT OF THE INTERIOR
Fish and Wildlife Service
Washington, D.C. 20240

In Reply Refer To:
FWS/OES

Memorandum

To: Regional Director, Regions 1, 2, 3, 4, 5, 6, and 7 (ARD/FA or ARD/AFF) Acting Associate

From: Director

Subject: Solicitor's Opinion Regarding Endangered Species Act (ESA) Conservation Obligations of Federal Agencies

Attached, please find the above-mentioned Solicitor's (SOL) opinion (dated September 7, 1983). In it, SOL rejects the district court's conclusion that (Section 7(a)(1) of the ESA) can mandate a *particular* conservation program for a listed species at the expense of other project objectives. In other words, SOL feels Federal agencies have the authority to integrate endangered species conservation into project planning but are not required to do so in any particular manner. The only mandatory requirement placed on Federal agencies is to insure that their actions are not likely to jeopardize listed species (Section 7(a)(2) of the ESA). Thus, Biological Opinions should not include statements saying that unless a given agency adopts a particular conservation recommendation, it will be "in violation of its Section 7(a)(1) responsibilities."

The district court's decision is not precedent setting and should be applied only to the Stampede Reservoir case.

/s/ Roman H. Koenings

Attachment

UNITED STATES DEPARTMENT OF THE INTERIOR

Office of the Solicitor
Washington, D.C. 20240

(September 7, 1983)

Memorandum

To: Director, United States Fish and Wildlife Service

From: Associate Solicitor, Conservation and Wildlife

Subject: Endangered Species Act conservation obligations of Federal agencies

We have recently reviewed the district court opinion in *Carson-Truckee Water Conservancy District v. Watt,* 549 F. Supp. 704 (D. Nev. 1982), *appeal filed* No. 83-1549 (9th Cir., Jan. 3, 1983), which discussed the conservation obligations of Federal agencies under the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. §§ 1531 *et seq.* In the *Carson* case, the plaintiffs sought to force the Bureau of Reclamation to store additional water in the Stampede Reservoir for municipal and industrial use. Ultimate diversion of the stored water for such uses would reduce the flow of water into Pyramid Lake, the habitat for two fish which are listed under the ESA. The plaintiffs had contended that the ESA did not prevent the Secretary

from operating Stampede Reservoir for municipal and industrial uses as long as that operation would not jeopardize the continued existence of the cui-ui fish and the Lahontan cutthroat trout. In response to this contention, defendants argued that the Secretary had an affirmative obligation under the ESA to *conserve* those two fish above and beyond the substantive prohibition found in Section 7(a)(2) against jeopardizing their continued existence. The defendants thus cited this higher conservation responsibility as authority for operating Stampede Reservoir so as to aid in the recovery of the cui-ui and the Lahontan cutthroat trout. In ruling for the defendants, it is our opinion that the district court imposed greater burdens on federal agencies under the ESA than those originally intended by Congress. Our analysis follows.

Statutory Framework

Five subsections of the ESA are relevant for purposes of analyzing the district court's decision in the *Carson* case. First, subsection 2(c)(1) of the ESA sets forth the general hortatory policy that "all Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter." 16 U.S.C. § 1531(c).

Second, subsection 3(3) of the Act, 16 U.S.C. § 1532(3), states in part:

> The terms "conserve", "conserving", and "conservation" mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary. . . .

A third relevant part of the ESA is subsection 5(a), 16 U.S.C. § 1534(a), which expressly confers upon the Secretary of the Interior the responsibility for implementing "a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species pursuant to section 1533 of this title." This subsection has generally been considered to be the true source of the Secretary's affirmative conservation responsibilities under the ESA.

The two remaining relevant parts of the Act are subsections 7(a)(1) and 7(a)(2).[1] Subsection 7(a)(1), 16 U.S.C. § 1536(a)(1), restates the general hortatory language in subsection 2(c)(1) quoted above and constitutes an affirmative grant of authority to Federal agencies to aid in the conservation and recovery of listed species through existing agency programs:

> The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

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[1]Before the enactment of the Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, 92 Stat. 3751, the "conservation" and "jeopardize" standards of section 7 were combined in one lengthy sentence. The 1978 Amendments added an exemption process and divided the "conservation" and "jeopardize" provisions into separate sentences within subsection 7(a). Finally, the Endangered Species Act Amendments of 1979, Pub. L. No. 96-159, 93 Stat. 1241, separated the "conservation" and "jeopardize" standards into subsections 7(a) (1) and 7(a) (2), respectively.

Subsection 7(a)(2), 16 U.S.C. § 1536(a)(2), on the other hand, sets out the Act's major substantive limitation on the exercise of Federal agency discretion by requiring that each agency shall:

> in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this action. . . .[2]

Analysis

Although the above subsections of the ESA constitute the relevant legal framework for addressing the issues raised in the *Carson* case, the district court only relied upon subsections 2(c)(1), 3(3) and 7(a)(2) in issuing its opinion. After a cursory recital of the provisions of the first two of those subsections, the district court cited the Supreme Court decision in *Tennessee Valley Authority v. Hill,* 437 U.S. 153 (1978) as standing for the proposition that the ESA "gives endangered species the highest priority over all federal projects." *Carson, supra,* 549 F. Supp. at 709. The district court then went on to cite and adopt the hold-

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[2]Subsection 7(a)(2) thus contains two substantive prohibitions: federal agencies shall not "jeopardize" the continued existence of a listed species or adversely modify its critical habitat. For purposes of this memorandum, any reference to the "jeopardy" prohibition under subsection 7(a)(2) should be understood to also include the prohibition against adversely modifying critical habitat.

ings of two migratory bird hunting regulation cases involving endangered species, *Defenders of Wildlife v. Andrus*, 428 F. Supp. 167 (D.D.C. 1977) and *Connor v. Andrus*, 453 F. Supp. 1037 (W.D. Tex. 1978).[3] Relying upon the above cases, the district court in the *Carson* case concluded that

> . . . the Secretary is required to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and the Lahontan cutthroat trout are no longer classified as endangered or threatened. *Carson, supra*, 549 F. Supp. at 710.

We disagree with this conclusion for a number of reasons. To begin with, no one disputes that the Secretary has express conservation responsibilities under the ESA. We have identified these responsibilities as arising specifically from subsection 5(a), and more generally from subsections 2(c)(1) and 7(a)(1), of the Act. Within the Department of the Interior, the agency that has been delegated the Secretary's affirmative conservation responsibilities under subsection 5(a) of the Act is the United States Fish and Wildlife Service. 242 D.M. 1.1A.

Coincidentally, it was also the Fish and Wildlife Service that was the defendant in the *Defenders of Wildlife* and *Connor* cases (relied upon by the district court in *Carson*). The Service was admonished in those two cases for only focusing on avoiding the "jeopardy" of listed species under its migratory bird hunting program. However, those cases did not ultimately turn on the Service's compliance with its conservation responsibilities under the ESA. Rather,

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[3]Those cases addressed the relationship between the Endangered Species Act, the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 *et seq.*, and the Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706.

they turned on the more narrow grounds of whether the Service had established an adequate administrative record regarding endangered species and migratory bird hunting so as to rebut the charge that the agency's hunting regulations were arbitrary and without a rational basis under the Administrative Procedure Act. In both cases, the Service's regulations were found to be arbitrary, albeit for entirely different reasons. Thus, instead of being viewed as authority for establishing a sweeping new set of stringent endangered species priorities, the *Defenders of Wildlife* and *Connor* cases should be read as fairly narrow cases under the Administrative Procedure Act which do no more than remind agencies of the need to clearly articulate the factual basis for their regulatory actions.

In addition to putting an inappropriate gloss on the *Defenders of Wildlife* and *Connor* cases, the district court in *Carson* also confused the set of priorities created by Congress under subsections 7(a)(1) and 7(a)(2). No one can dispute after *Tennessee Valley Authority v. Hill* that Congress established endangered species conservation as the highest priority under the latter subsection of the Act. When a proposed project is found likely to jeopardize the continued existence of a listed species, the project must either be exempted under the complicated procedure set forth in subsections 7(e) through (n) of the Act or be modified or abandoned altogether.

Moreover, as shown by the complex amendments to section 7 enacted in 1978, 1979, and 1982, it has been subsection 7(a)(2), with its rigid set of priorities and procedures, that has generated the most Congressional scrutiny and

review.[4] It is significant to note, however, that this lengthy Congressional debate regarding section 7 has been marked by conspicuous silence over the substantive impacts, if any, of subsection 7(a)(1), and with valid reason. For while subsection 7(a)(1) could be characterized as a general grant of authority to integrate endangered species conservation into other existing federal programs, that subsection did not, as did subsection 7(a)(2), establish any rigid set of priorities among competing, often conflicting, program objectives. That is, while subsection 7(a)(1) added endangered species conservation to the potential list of generic program goals and authorities for a given project, it did not require that such conservation initiatives be factored in first. Subsection 7(a)(1) had a more limited purpose: it resolved once and for all the question as to whether federal agencies had the authority to add endangered species conservation into their planning processes. No longer could agencies argue that they lacked the authority to accomplish that objective. While giving federal agencies this grant of discretionary planning authority, however, Congress did not dictate a particular set of results. It did not mandate that endangered species conservation be accorded the highest priority in all planning efforts.

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[4]See H.R. Conf. Rep. No. 835, 97th Cong., 2d Sess. 25-28 (1982); S. Rep. No. 418, 97th Cong., 2d Sess. 16-22 (1982); H.R. Rep. No. 567, 97th Cong., 2d Sess. 10-11, 13-15, 24-29 (1982); H.R. Conf. Rep. No. 697, 96th Cong., 1st Sess. 12-16 (1979); S. Rep. No. 151, 96th Cong., 1st Sess. 3-4, 4-6 (1979); H.R. Rep. No. 167, 96th Cong., 1st Sess. 5-6 (1979); H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18-23 (1978); S. Rep. No. 874, 95th Cong., 2d Sess. 2-7 (1978); H.R. Rep. No. 1625, 95th Cong., 2d Sess., 7-13, 14-15, 19-25 (1978).

This difference in approach between subsections 7(a)(1) and 7(a)(2) has a ready explanation. Subsection 7(a)(1) provides federal agencies with the authority to "do good things" for endangered species; *i.e.*, to aid in their recovery through compatible agency programs. Subsection 7(a)(2), on the other hand, focuses on the potential for *conflict* between a given agency program and endangered species conservation. In such conflict situations where the continued existence of a listed species may be at stake, Congress has made the value judgment that endangered species conservation comes first. Any lesser choice could result in extinction, as recognized by the Supreme Court in *Tennessee Valley Authority v. Hill, supra,* 437 U.S. at 184-85.

The district court erred in the *Carson* case, by failing to recognize this difference in focus between subsections 7(a)(1) and 7(a)(2). It inappropriately applied the analysis of the Supreme Court in *Tennessee Valley Authority v. Hill* (a case focusing on the jeopardy standard now found in subsection 7(a)(2)) to a dispute regarding the Secretary's authority to discretionarily operate Stampede Reservoir for the benefit of endangered and threatened species (a subsection 7(a)(1) case). As to whether the Secretary had the discretionary authority under the ESA to integrate endangered species conservation into the operation of Stampede Reservoir, there can be no doubt. Subsection 7(a)(1) clearly provides that authority and the district court's opinion should have stopped with that conclusion. It compounded its error, however, by going further and *mandating* endangered species conservation as the priority project purpose until such time as the cui-ui fish and the Lahontan cutthroat trout are recovered.

This ordering of priorities is not only inconsistent with general Congressional intent for subsection 7(a)(1), it also produces the anomalous result of according greater substantive weight and impact to subsection 7(a)(1) than to subsection 7(a)(2).[5] Heretofore, the jeopardy standard under subsection 7(a)(2) was considered to be the only substantive restriction on agency action under section 7. Moreover, it has always been the position of the Service that a federal agency could still be in compliance with section 7 for a given project that adversely affects a listed species, so long as the anticipated level of takings or impacts were not so high as to result in a finding of jeopardy.[6]

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[5]Although there is no express legislative history directly weighing and comparing the relative strengths of subsection 7(a)(1) with 7(a)(2), there can be no doubt that Congress considered the jeopardy standard of subsection 7(a)(2) as being the substantive cornerstone of section 7:

> The term "is likely to jeopardize" is used because the *fundamental* obligation of section 7(a) of the act is that Federal agencies insure their actions do not jeopardize the continued existence of an endangered or threatened species.

S. Rep. No. 151, *supra* note 4, at 4 (emphasis added).

[6]The current section 7 regulatory definition of jeopardy recognizes that a given project can incidentally take a number of endangered species and still not violate the jeopardy standard. 50 C.F.R. § 402.02. The level of incidental take allowable under subsection 7(a)(2) varies, depending on the relative scarcity of the particular species involved. Congress implicitly ratified this regulatory construction in 1982 by providing in subsections 7(b)(4) and (o) of the Act that incidental takings which occur for a project that received a "no jeopardy" biological opinion, would not constitute a violation of the taking prohibitions of section 9. However, if subsection 7(a)(1)'s affirmative conservation provisions were the true substantive

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If one followed the logic of the *Carson* case, however, one would now have to assume that this long standing administrative interpretation of the Act was wrong. It would no longer be enough to show that a proposed action would not jeopardize the continued existence of a listed species. Henceforth you would have to show that a given project was contributing to the conservation of affected listed species and would continue to do so until the species were recovered. Thus, it would now be unacceptable for a proposed project to be slightly adverse to a listed species or even neutral in its impacts. It would have to affirmatively promote the recovery of affected listed species, even at the expense of overriding other legally-authorized project purposes.

This simply is not what Congress could have intended, for the resultant impacts would be so extreme and devastating to Federal agency programs that Congress would have unquestionably addressed the matter in the 1978, 1979 and 1982 amendments to the Act. What they addressed instead was the need to provide an exemption to the only substantive standard that they perceived to exist in section 7, the jeopardy standard in subsection 7(a)(2). Throughout the exemption process provisions of the Act, it is a conflict with subsection 7(a)(2) and not subsection 7(a)(1) that is a prerequisite to seeking an exemption. *See* 16 U.S.C. § 1536(f), (g)(1) and (3), (h). Yet the

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yardstick upon which federal programs were to be measured, Congressional amendments in subsections 7(b)(4) and (o) would have been pointless, since it is difficult to conceive of a situation where any level of incidental take could satisfy the affirmative conservation standard decreed by the district court in *Carson*. Thus, it is clear that subsection 7(a)(2) contains the only substantive mandate controlling agency action under section 7.

Carson ruling puts a gloss on subsection 7(a)(1) that makes it more burdensome than subsection 7(a)(2). Would Congress have spent so must time on subsection 7(a)(2) if subsection 7(a)(1) were even more restrictive? We think that the obvious answer to that question is "no."

Conclusion

For the reasons stated above, we conclude that the interpretations placed upon the Secretary's conservation responsibilities in the *Carson* case are in error and beyond the intent of Congress. In addition to overlooking the truly relevant subsections of the ESA, the district court misplaced its reliance upon the *Defenders of Wildlife* and *Connor* cases. Those cases should be viewed as fairly narrow cases under the Administrative Procedure Act and nothing more. Moreover, *Tennessee Valley Authority v. Hill* is of questionable relevance, since that case concerned a violation of the substantive prohibition of section 7 (the jeopardy standard) and did not involve the grant of affirmative conservation authority in subsection 7(a)(1). While a Congressionally-mandated set of priorities was established under subsection 7(a)(2) of the Act, no such ordering of project purposes and priorities was established under subsection 7(a)(1). Federal agencies are now empowered to incorporate endangered species concerns into project planning, but so long as the jeopardy standard of subsection 7(a)(2) is not violated, no *particular* conservation goal or priority is required under subsection 7(a)(1).

In short, the district court in the *Carson* case should have upheld the discretionary authority of the Bureau of Reclamation to allocate Stampede Reservoir waters for endangered species conservation purposes and left it at that.

As a matter of law, no one conservation regime should be considered favored or mandated as opposed to another. The attempt of the district court to mandate a particular program represents an unwarranted limitation of the discretionary conservation authorities granted to federal agencies. A clarification of these matters should thus be sought on appeal.

/s/ Keith E. Eastin

No. 84-1384

Office-Supreme Court, U.S.
FILED
MAR 29 1985
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

vs.

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS CARSON-TRUCKEE WATER CONSERVANCY DISTRICT AND SIERRA PACIFIC POWER COMPANY IN OPPOSITION

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22pp

QUESTIONS PRESENTED

1. Whether the court of appeals was correct in affirming the district court's conclusion that it is inappropriate to award attorney's fees to petitioner in this case?

2. Whether Congress has authorized the court to make an attorney's fees award under Section 11(g)(4) of the Endangered Species Act, 16 U.S.C. § 1540(g)(4), in a case that does not meet the criteria of Sections 11(g)(1) and 11(g)(2), 16 U.S.C. §§ 1540(g)(1) and 1540(g)(2)?

LIST OF PARTIES*

Respondents, plaintiffs-appellees in the United States Court of Appeals for the Ninth Circuit, are the State of Nevada, the Carson-Truckee Water Conservancy District and the Sierra Pacific Power Company. Petitioner, defendant intervenor-appellant in the Ninth Circuit, is the Pyramid Lake Paiute Tribe of Indians. The Secretary of the Interior, the Commissioner of the Bureau of Reclamation, and the Regional Director, Mid-Pacific Region, Bureau of Reclamation were defendants in the main action, but did not actively participate in the appeal on the attorney's fee issue. By letter dated March 12, 1985, the Solicitor General has advised the Clerk that the Government does not intend to file a brief at this stage of the proceedings unless requested by the Court to do so.

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*Pursuant to Rules 21.1(b) and 28.1 of this Court, respondents inform the Court that Sierra Pacific Power Company is a subsidiary of Sierra Pacific Resources, which has two additional subsidiaries—Lands of Sierra, Inc. and Sierra Energy Company. Valmy 2 Construction Company is the subsidiary of Sierra Pacific Power Company.

TABLE OF CONTENTS

	Page
Questions presented	i
List of parties	ii
Statute to be construed	1
Statement of the case	2
Reasons why the petition should be denied	4
I	
The decision below does not raise important questions of federal law nor does it frustrate the intent of Congress	4
II	
The decision is in accord with the Court's decision in Ruckelshaus v. Sierra Club	6
III	
The decision below is in accord with the decisions of the Courts of Appeals for the District of Columbia and the Third Circuits	7
IV	
The decision below is supported on independent grounds not reached by the courts below	9
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

	Page
Alabama Power Co. v. Gorsuch, 672 F.2d 1 (1982)	7, 8
Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975)	10
Carson-Truckee Water Conservancy District v. Watt, 537 F.Supp. 106 (D.Nev. 1982)	3
Carson-Truckee Water Conservancy District v. Watt, 549 F.Supp. 704 (D.Nev. 1982)	3
Carson-Truckee Water Conservancy District v. Watt, 575 F.Supp. 467 (D.Nev. 1983)	3, 8
Carson-Truckee Water Conservancy District v. Clark, 741 F.2d 257 (9th Cir. 1984)	2, 3
Carson-Truckee Water Conservancy District v. Secretary of the Interior, 748 F.2d 523 (9th Cir. 1984)	4, 8
Cuneo v. Rumsfeld, 553 F.2d 1360 (D.C.Cir. 1977)	8
Delaware Citizens For Clean Air, Inc. v. Stauffer Chem. Co., 62 FRD 353 (D.Del. 1974), *aff'd* 510 F.2d 969 (3rd Cir. 1975)	8
Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42 (1982)	5, 7
Hughes v. Rowe, 449 U.S. 5 (1980)	9
Middlesex Cty. Sewerage Auth. v. Sea Clammers, 453 U.S. 1 (1981)	10
Natural Resources Defense Council v. Environmental Protection Agency, 484 F.2d 1331 (1st Cir. 1973)	5
Nevada v. United States, 463 U.S. 110 (1983)	5
Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400 (1968)	9

TABLE OF AUTHORITIES CITED

CASES

Page

Ruckelshaus v. Sierra Club, ___ U.S. ___, 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983) 6, 7, 9

Sierra Club v. Costle, 657 F.2d 298 (D.C.Cir. 1981) 6

Sierra Club v. Gorsuch, 672 F.2d 33 and 684 F.2d 972 (D.C.Cir. 1982) 5, 6, 7, 8

Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982) 7, 8, 9

Statutes and Rules

Clean Air Act, Section 307(f), 42 U.S.C. §7607(f) 6, 7

Endangered Species Act, Section 11(g):

16 U.S.C. §1540(g) 1

16 U.S.C. §1540(g)(1) ..... i, 1, 3

16 U.S.C. §1540(g)(2) ..... i, 1, 3, 6, 10

16 U.S.C. §1540(g)(4) ..... i, 1, 4, 6, 7, 9

Outer Continental Shelf Lands Act, 43 U.S.C. §1349(a)(5) 7

Toxic Substances Control Act, 15 U.S.C. §2618(d) 7

U.S. Supreme Court Rules:

17.1 5

21.1(b) and 28.1 ii

No. 84-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

VS.

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENTS CARSON-TRUCKEE WATER CONSERVANCY DISTRICT AND SIERRA PACIFIC POWER COMPANY IN OPPOSITION

STATUTE TO BE CONSTRUED

Petitioner seeks attorney's fees under Section 11(g) of the Endangered Species Act (ESA), 16 U.S.C. §1540(g), but cites only one brief excerpt of the relevant statute. Pet. 3.[1] Petitioner ignores the interrelated paragraphs that restrict attorney's fee awards to certain types of cases, 16 U.S.C. 1540(g)(1), and that impose stringent notice requirements, 16 U.S.C. 1540(g)(2). The relevant provision, Section 11(g) of the Endangered Species Act, 16 U.S.C. 1540(g), is reprinted in its entirety in Appendix A.

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[1] In fact, petitioner misquotes the excerpt it relies upon. Section 1540 (g) (4) provides:

"(4) The court, in issuing any final order *in any suit* brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

The quotation at page 3 of the petition omits the italicized language.

STATEMENT OF THE CASE

Respondents sued the Secretary of the Interior in 1976 to compel it to sell water from Stampede Reservoir for municipal and industrial use in the Reno/Sparks area. Respondents' theory, in a nutshell, was that because Stampede was authorized and built as a federal reclamation project the Secretary has a mandatory duty under the federal reclamation laws[2] to sell Stampede's water for reimbursable uses, which include municipal and industrial uses. Although Stampede was completed in 1970, the Secretary refused to sell any water and instead used all of it for restoration programs for two endangered species of fish, the cui-ui and the Lahontan cutthroat trout. Those fish constitute the fishery at petitioner's Pyramid Lake Reservation. Throughout this litigation the Secretary has continued to use Stampede's water exclusively for petitioner's fishery.

The Secretary's answer raised numerous defenses, including the Endangered Species Act. The Secretary claimed that the ESA authorized him to use Stampede's water exclusively for the fish, even though that method of operation totally converted Stampede from a reclamation project to a fishery restoration project. The Secretary claimed that the ESA authorizes him to do that, even though some of the water could be sold without jeopardizing the listed species[3] and even though the conversion of the project to serve fishery uses exclusively violates Congress' express $2 million limitation on spending for fish and wildlife development.[4]

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[2] The reclamation laws that establish the Secretary's duty to seek reimbursement are thoroughly discussed in the Petition for Writ of Certiorari (No. 84-808) filed by Nevada, Carson-Truckee Water Conservancy District and Sierra Pacific Power Company in *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (9th Cir. 1984).

[3] The Secretary concedes that Stampede water could be sold for municipal and industrial uses without jeopardizing the cui-ui or the trout. See Interrogatory No. 23 and Federal Defendants' Answer thereto, Trial Exhibit No. 226.

[4] See 43 U.S.C. 614c.

Petitioner, which intervened because it did not believe its economic interests in the fishery would be "adequately represented by the Secretary," Pet. 4, parrotted the Government's answer, including the ESA defense. It raised no new ESA defenses or issues. Instead, it raised several technical defenses including questions of standing, private right of action, and whether or not municipal and industrial use is an authorized use of Stampede's water.

The district court rendered three separate decisions in the case. In *Carson-Truckee Water Conservancy District v. Watt*, 537 F.Supp. 106 (D.Nev. 1982) (*CTWCD I*), it ruled against petitioner on its technical defenses. In *Carson-Truckee Water Conservancy District v. Watt*, 549 F.Supp. 704, 710 (D.Nev. 1982) (*CTWCD II*), it held that the ESA requires the Secretary "to give the Pyramid Lake fishery priority over all other purposes of Stampede until the cui-ui fish and the Lahontan cutthroat trout are no longer classified as endangered or threatened."[5] In *Carson-Truckee Water Conservancy District v. Watt*, 575 F.Supp. 467 (D.Nev. 1983) (*CTWCD III*), it denied petitioner's request for an award of attorney's fees and costs.

The district court denied petitioner's fee request because it concluded that any fee award would be "inappropriate." 575 F.Supp. at 468. The ESA provision upon which petitioner relies, 16 U.S.C. § 1540(g)(4), allows attorney's fee awards in certain types of cases "whenever the court determines such an award is *appropriate*." (Emphasis added.)[6]

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[5] The Ninth Circuit affirmed in *Carson-Truckee Water Conservancy District v. Clark*, 741 F.2d 257 (1984) (CTWCD IV). Plaintiffs' petition for certiorari, No. 84-808, was denied on March 25, 1985.

[6] Respondents raised in the district court the issue of whether Congress has authorized an attorney's fee award in a case such as this. Section 11(g) plainly restricts attorney's fee awards to private actions that are brought to enforce the ESA against a violator of that Act when the Secretary refuses to discharge his duties under the Act. See 16 U.S.C. §§ 1540(g) (1) and (2). Respondents raised that issue as an additional ground for denying petitioner's attorney's fee request, but the district court and the court of appeals declined to decide it. The issue is discussed in greater detail at Section IV, *infra*.

In deciding that any award would be inappropriate, the district court considered whether the litigation involved important, complex or novel issues, whether it aided in the interpretation of the ESA, and whether the Tribe's efforts had substantially contributed to the goals of the ESA. 575 F.Supp. at 469. Its denial of petitioner's fee application rests squarely on its findings of fact. It found that the Secretary had commenced a recovery program for the cui-ui and trout long before the litigation began, and that the Secretary, not petitioner, had raised the ESA defense. *Id.* at 470. Further, it found that the Secretary made a substantial financial contribution to the defense, and that the Secretary's attorneys had done a "first-class job in defending the case." *Id.* In contrast, petitioner had entered the litigation "primarily for its own economic self-interest" and had contributed principally by raising issues of a "technical nature [that] were not intended to, nor did they, assist in the interpretation or implementation of the Act." *Id.*

Petitioner appealed. The Ninth Circuit, in an opinion by Judge Duniway, affirmed. *Carson-Truckee Water Conservancy District v. Secretary of the Interior*, 748 F.2d 523 (9th Cir. 1984) (*CTWCD V*). It held that the district court had used the correct legal standard to judge appropriateness and that it had not abused its discretion. *Id.* at 526.

REASONS WHY THE PETITION SHOULD BE DENIED

I

THE DECISION BELOW DOES NOT RAISE IMPORTANT QUESTIONS OF FEDERAL LAW NOR DOES IT FRUSTRATE THE INTENT OF CONGRESS

At pages 9 through 13 of the petition, petitioner erroneously contends that this case raises important questions of federal law and that the decision below "frustrates" Congressional intent. Petitioner argues that any case involving an Endangered Species issue should result in a fee award to the prevailing party except in "the most exceptional of circumstances." Pet. 13.

Petitioner's argument ignores the plain language of the statute. Section 11(g)(4), 16 U.S.C. § 1540(g)(4), allows the court to

make an award in certain types of cases "whenever the court determines such an award is *appropriate*." (Emphasis added.) Construing almost identical language in the attorney's fee provision of the Clean Air Act, the District of Columbia Circuit explained:

> "Congress expressly used 'appropriate' as the standard in section 307(f); it specifically gave to *courts* the authority to interpret that standard on a case-by-case basis (an entirely logical delegation, since courts would be in the best position to assess the contributions of the parties and the importance of such case). . . . Clearly Congress knows the difference between 'prevailing' and 'appropriate.'" *Sierra Club v. Gorsuch*, 672 F.2d at 42, n 10, emphasis in the original.

Awards are discretionary, not mandatory. Petitioner's argument seeks to deprive the courts of this discretion, even though "Congress intended to give the Courts greater latitude." *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42, 48 (D.C.Cir. 1982). Petitioner's proposed rule of mandatory awards in all but the most exceptional of circumstances would deprive the courts of the ability "to allocate the costs of litigation equitably." *Natural Resources Defense Council v. Environmental Protection Agency*, 484 F.2d 1331, 1338 (1st Cir. 1973).

Furthermore, the case does not meet the criteria of S.Ct. Rule 17.1 which requires "special and important reasons" to warrant the granting of certiorari. The denial of attorney's fees was based on a unique factual situation that is unlikely to recur. The suit was not to enforce the ESA but to enforce the reclamation laws. The ESA was a defense. Long before petitioner became involved, the Secretary had started the fishery restoration program and had raised the ESA defense. Further, petitioner's intervention was prompted by concern for its own economic interests, not concern for endangered species. Pet. 3-4. While petitioner may have reason to distrust the Secretary when its economic interests are involved, *see, e.g., Nevada v. United States*, 463 U.S. 110 (1983), that was not the type of citizen participation that Congress wanted to encourage. To the contrary, Congress expressly disallowed private enforcement actions when the Secretary has

taken action. 16 U.S.C. § 1540(g)(2). Lastly, the case is unlike an ESA enforcement action in that petitioner spent most of its effort trying to prevent the court from reaching the ESA issue.

Because of these peculiar facts, the decision below is of interest only to the parties to the litigation and does not raise any important issue of federal law worthy of review by this Court.

II

THE DECISION IS IN ACCORD WITH THE COURT'S DECISION IN RUCKELSHAUS V. SIERRA CLUB

To interest the Court in this case, petitioner argues that the decision below conflicts with *Ruckelshaus v. Sierra Club*, U.S. , 103 S.Ct. 3274, 77 L.Ed.2d 938 (1983). Pet. 13-18. Petitioner interprets *Ruckelshaus* to require the courts to award attorney's fees to the prevailing party unless there are exceptional circumstances why an award should not be made. Pet. 14. The argument is based on a misreading and misinterpretation of *Ruckelshaus*.

Ruckelshaus was a suit by the Sierra Club and the Environmental Defense Fund in the District of Columbia Circuit for review of the Environmental Protection Agency's standards governing emissions of carbon-dioxide from coal-fueled power plants. The court of appeals rejected the plaintiffs' claims on the merits. *Sierra Club v. Costle*, 657 F.2d 298 (D.C.Cir. 1981). Nonetheless, in *Sierra Club v. Gorsuch*, 672 F.2d 33 and 684 F.2d 972 (D.C.Cir. 1982), it awarded the plaintiffs attorney's fees under Section 307(f) of the Clean Air Act, 42 U.S.C. § 7607(f). Like Section 11(g)(4) of the ESA, Section 307(f) of the Clean Air Act allows the court to award attorney's fees in certain proceedings when such an award is appropriate.

This Court reversed that attorney's fee award in *Ruckelshaus v. Sierra Club, supra*. The Court held that some success on the merits must be obtained before a party becomes "eligible" for a fee award under § 307(f). *Ruckelshaus*, 103 S.Ct. at 3276.

In stretching to find a conflict between the decision below and *Ruckelshaus*, petitioner confuses *eligibility* for an award with

entitlement to an award. *Ruckelshaus* dealt with eligibility. It did not consider the question of entitlement and therefore there is no conflict.

III

THE DECISION BELOW IS IN ACCORD WITH THE DECISIONS OF THE COURTS OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE THIRD CIRCUITS

Petitioner erroneously contends that the Ninth Circuit's decision conflicts with decisions by the Courts of Appeals for the District of Columbia and the Third Circuits. Pet. 19-20. It argues that the District of Columbia Circuit has established a dualstandard for determining appropriateness depending upon whether the requesting party prevailed on the merits. It claims the district court erroneously applied the non-prevailing party standard by requiring petitioner to show it made a substantial contribution to the goals of the ESA. Again, petitioner misconstrues the cases upon which it relies.

The District of Columbia Circuit decisions, *Alabama Power Co. v. Gorsuch*, 672 F.2d 1 (1982), *Sierra Club v. Gorsuch*, 672 F.2d 33 (1982), *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42 (1982), and *Village of Kaktovik v. Watt*, 689 F.2d 222 (1982), interpreted the "whenever . . . appropriate" standard as used in the attorney's fee provisions of the Clean Air Act, 42 U.S.C. § 7607(f), the Toxic Substances Control Act, 15 U.S.C.§ 2618(d), the Outer Continental Shelf Lands Act, 43 U.S.C. § 1349(a)(5), and the Endangered Species Act, 16 U.S.C. § 1540(g)(4). Those cases articulated "*one* standard for appropriateness, and that standard allows courts to award attorneys' fees to parties who have 'substantially contributed' to the goals of the . . . Act." *Sierra Club*, 672 F.2d at 42 n 10. (Emphasis in the original.) Further, the court of appeals said that "the relevant inquiry is whether the litigation—successful or not furthered the goals of the Act." *Id.* at 36. The cases "made clear that whether the party claiming costs or fees has prevailed does not control the inquiry on appropriateness, and that the dominant consideration is whether

litigation by the party has served the public interest by assisting the interpretation or implementation of the . . . Act." *Alabama Power*, 672 F.2d at 3.

The District of Columbia Circuit expressly disavowed any suggestion that the prevailing party is automatically entitled to an award of fees. "Even a prevailing or substantially prevailing party who does not substantially contribute to the goals of the . . . Act may not be entitled to attorneys' fees." *Sierra Club*, 672 F.2d at 38 n 8. "'Although a complainant may have substantially prevailed in an action, the award of costs and attorney fees does not automatically follow. There are other factors which the court should consider in determining the appropriateness of an award of costs and attorney fees.'" *Id.* at 39 n 8, quoting *Cuneo v. Rumsfeld*, 553 F.2d 1360, 1365 (D.C.Cir. 1977).

The factors which the District of Columbia Circuit considered in determining appropriateness in those cases are the same as the factors considered by the district court in this case, namely whether the litigation involved important complex or novel issues, *Sierra Club*, 672 F.2d at 38-39, *Village of Kaktovik*, 689 F.2d at 224-225, whether the litigation aided in the interpretation of the ESA, *Sierra Club*, 672 F.2d at 40, and whether the requesting party's efforts substantially contributed to the goals of the statute, *Sierra Club*, 672 F.2d at 41, *Village of Kaktovik*, 689 F.2d at 224-225. The district court and the Ninth Circuit used the same test. *CTWCD III*, 575 F.Supp. at 469; *CTWCD V*, 748 F.2d at 525.

Delaware Citizens For Clean Air, Inc. v. Stauffer Chem. Co. 62 FRD 353 (D.Del. 1974), *aff'd* 510 F.2d 969 (3rd Cir. 1975), which is cited at page 20 of the petition, is consistent with this test. Plaintiffs there commenced an action even though the defendant chemical manufacturer was already seeking an EPA variance for more time to comply with emission standards. The EPA, like the Secretary in this case, was actively enforcing the Clean Air Act. The district court held that "a private suit in such circumstances is not the sort of private suit Congress sought to encourage in order to aid the limited enforcement powers of state

and federal regulatory agencies and . . . is not an appropriate case for an award of attorneys fees." 62 FRD at 357.[7]

IV

THE DECISION BELOW IS SUPPORTED ON INDEPENDENT GROUNDS NOT REACHED BY THE COURTS BELOW

Petitioner bases its fee request on Section 11(g)(4) of the ESA, 16 U.S.C. § 1540(g)(4), which provides that:

> (4) The court, in issuing any final order *in any suit brought pursuant to paragraph (1) of this subsection*, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate." (Emphasis added.)

Petitioner, however, ignores the italicized language.

Paragraph (1) of Section 11(g) lists three narrowly-defined types of citizen enforcement actions that may be brought under the ESA. They are actions to enjoin any person who is in violation of the Act, actions to compel the Secretary to promulgate

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[7] Petitioner also argues that review should be granted because the Ninth Circuit's interpretation of the ESA attorney's provision is inconsistent with the interpretations of the attorney's fee provisions in various civil rights acts. Pet. 21-24. But while the District of Columbia Circuit cases involve attorney's fee statutes that are identical to Section 11(g) (4) of the ESA, *Ruckelshaus*, 103 S.Ct. at 3276 n 1, the civil rights statutes cited by petitioner involve different standards and different policy considerations. See *e.g.*, *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968); *Hughes v. Rowe*, 449 U.S. 5, 14-15 (1980). No court of appeals has held that the attorney's fee provisions of the ESA and other similarly-phrased statutes should be construed and applied the same way as the fee provisions of the civil rights acts. And, contrary to the suggestion at page 22 of the petition, the District of Columbia Circuit has not "analogized to the federal civil rights laws" in construing the fee provisions of these environmental acts. *Village of Kaktovik v. Watt*, 689 F.2d 222 (D.C. Cir. 1982), which is cited by petitioner as its authority, does not mention any civil rights act.

emergency regulations, and actions to compel the Secretary to perform non-discretionary duties under the Act. Citizen suits that fit within Section 11(g)(1) are allowed, "except as provided in paragraph (2)." Paragraph (2) contains notice provisions that preclude a private citizen from bringing an action under the ESA until and unless written notice has been given to the alleged violator. Moreover, no private action is allowed if the Secretary has taken action. 16 U.S.C. § 1540(g)(2).

This case does not satisfy these requirements. Petitioner has never sought to enjoin respondents from violating any provision of the ESA. Petitioner has never given any notice required under the notice requirements of Section 11(g)(2). And since the Secretary has been actively carrying out his duties under the ESA, petitioner has never brought an action to compel him to do so. Under the circumstances, the attorney's fee provision of Section 11(g)(4) provides no authority for the award of attorney's fees in this case. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); see also *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

March 27, 1985

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(Appendix A follows)

APPENDIX A

Subsection 11(g) of the Endangered Species Act of 1973, as amended, 16 U.S.C. §1540(g), provides as follows:

Citizen Suits

(g)(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority therof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

(2)(A) No action may be commenced under subparagraph (1)(A) of this section—

(i) prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation;

(ii) if the Secretary has commenced action to impose a penalty pursuant to subsection (a) of this section; or

(iii) if the United States has commenced and is diligently prosecuting a criminal action in a court of the United States or a State to redress a violation of any such provision or regulation.

(B) No action may be commenced under subparagraph (1))B) of this section—

(i) prior to sixty days after written notice has been given to the Secretary setting forth the reasons why an emergency is thought to exist with respect to an endangered species or a threatened species in the State concerned; or

(ii) if the Secretary has commenced and is diligently prosecuting action under section 1535(g)(2)(B) (ii) of this title to determine whether any such emergency exists.

(C) No action may be commenced under subparagraph (1)(C) of this section prior to sixty days after written notice has been given to the Secretary; except that such action may be brought immediately after such notification in the case of an action under this section respecting an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants.

(3)(A) Any suit under this subsection may be brought in the judicial district in which the violation occurs.

(B) In any such suit under this subsection in which the United States is not a party, the Attorney General, at the request of the Secretary, may intervene on behalf of the United Sates as a matter of right.

(4) The court, in issuing any final order in any suit brought pursuant to paragraph (1) of this subsection, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate.

(5) The injunctive relief provided by this subsection shall not restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any standard or limitation or to seek any other relief (including relief against the Secretary or a State agency).

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CLERK

No. 84-1384

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
Petitioner,

v.

CARSON-TRUCKEE WATER CONSERVATION DISTRICT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION FOR STATE OF NEVADA

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QUESTION PRESENTED

Whether the courts below properly held that an award of attorneys' fees to the Petitioner was inappropriate under the Endangered Species Act where the case itself did not substantially contribute to Endangered Species Act goals and where the Petitioner did not substantially contribute to the goals of the Act.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT OF THE CASE	1
I. The Decision Of The Ninth Circuit In This Case Does Not Conflict With *Ruckelshaus v. Sierra Club*	4
II. The Ninth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits	5
III. There Are Additional Reasons For Affirming The Decision Below	8
IV. Awards of Attorneys' Fees In Civil Rights Cases Are Not Relevant	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

Alabama Power Company v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982) 3

Carson-Truckee Water Conservancy District v. Watt, 537 F. Supp. 106 (D. Nev. 1982) 6

Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42 (D.C. Cir. 1982) 3, 6

Ruckelshaus v. Sierra Club, —— U.S. ——, 103 S. Ct. 3274 (1983) 4, 5

Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982) 3

Miscellaneous

16 USC § 1540(g) (1) 4, 8

16 USC § 1540(g) (4) 8

43 USC § 614 ..... 1, 2

IN THE

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PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF IN OPPOSITION FOR STATE OF NEVADA

STATEMENT OF THE CASE[1]

The Carson-Truckee Water Conservancy District, Sierra Pacific Power Company and the State of Nevada filed this action in 1976 for mandamus under the Washoe Project Act (43 USC § 614, *et seq.*) seeking to compel the Secretary of the Interior and other federal defendants to enter into a contract to supply Plaintiffs a por-

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[1] The statement of the case by the Petitioner generally describes the litigation. We attempt here not to repeat facts accurately stated by Petitioner, but to correct misstatements of facts by Petitioner and to supplement the statement with relevant facts that have been omitted by Petitioner.

tion of the yield of Stampede Reservoir for M & I use in the cities of Reno and Sparks, Nevada. Pursuant to the Washoe Project Act Congress required that Stampede be used for irrigation, flood control, power generation, fish and wildlife and "other beneficial purposes". Congress limited fish and wildlife use of the Stampede water to $2 million out of a total expenditure of $52 million. 43 USC §§ 614(c)(d).

The federal defendants had commenced negotiations for a water supply contract with the Plaintiff Conservancy District during the 1960's but finally refused to proceed, alleging the government's trust responsibilities to the Pyramid Lake Pauite Indians and the Tribe's *Winters* reserved rights as a rationale for not proceeding with the contract negotiations. The Plaintiffs then filed suit.

The government answered the complaint, raising numerous defenses for its refusal to complete the contract, including the Secretary's discretion not to contract, the government's fiduciary duty to the Tribe and the Endangered Species Act.

The Tribe moved to intervene in the action on the ground that it was the equitable owner of the waters under the *Winters* doctrine, and that a sale of water to the Plaintiffs would interfere with the Tribe's plans to develop a commercial fishery in the lower Truckee River and Pyramid Lake.

The district court granted the Tribe's motion to intervene and the Tribe then raised several defenses as a bar to Plaintiffs' action including Plaintiffs' lack of standing, lack of a private right of action and the lack of authority of the Secretary to sell Stampede waters for M & I purposes. The Tribe also raised the Endangered Species Act issue that had been asserted by the government.

The district court, in its opinion denying the Tribe's motion for attorneys' fees found that the litigation did

not aid in interpreting the Act and that the Tribe's efforts did not substantially contribute to the goals of the Act. Pet. App. 5, 6. All parties stipulated that the Act was applicable and the only issue to be tried was the amount of water necessary to meet the needs of the fish. The district court found further:

> In addition, the Secretary had already commenced a program to help the qui-ui and Lahontan cutthroat trout. The Government had raised the defense of the ESA in its original answer and was actively and energetically participating in the trial of the case. The Tribe concedes that the counsel for the Government did a first-class job in defending the case, and that the Government made significant financial contributions towards its defense.
>
> The Tribe entered the case primarily for its own economic self-interest. Most of the issues it raised, particularly those of a technical nature like the standing of the plaintiffs, were not intended to, nor did they, assist in the interpretation or implementation of the Act. In fact, some of these defenses, if they had been successful, would have had the opposite effect.[2]

Pet. App. 6.

Based on its findings, the district court then concluded that the Tribe had not met the test promulgated by *Alabama Power Company v. Gorsuch*, 672 F.2d 1 (D.C. Cir. 1982); *Sierra Club v. Gorsuch*, 672 F.2d 33 (D.C. Cir. 1982) and *Environmental Defense Fund v. Environmental Protection Agency*, 672 F.2d 42 (D.C. Cir. 1982):

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[2] The district court's findings were based on substantial evidence and were not challenged by the Tribe on appeal. Although the Tribe, in its Petition for Writ of Certiorari, now attempts to argue that it made additional arguments and that the government did a poor job and took positions below contrary to the interests of the Tribe and the fish, none of these arguments has any merit and must be rejected where they are being raised for the first time in this Court.

> [T]he dominant consideration is whether litigation by [the party seeking attorneys fees] has served the public interest by assisting the interpretation and implementation of the statute.

Pet. App. 5.

On appeal the Tribe did not challenge any of the district court's findings or conclusions. The Tribe raised only two legal issues:

> 1. Whether the district court erred as a matter of law by applying the standard set forth in *Alabama Power Company v. Gorsuch.*
>
> 2. Whether the Tribe was entitled to an attorney's fee despite the fact that it was a defendant-intervenor and not a party "commencing" a suit "to enjoin a violation" of the ESA as required by 16 USC § 1540(g)(1).[3]

On appeal to the Ninth Circuit, the Tribe argued that this court's holding in *Ruckelshaus v. Sierra Club*, —— U.S. ——, 103 S. Ct. 3274 (1983) overruled *Alabama Power Company*, and like cases, and established a new test whereby a party need not contribute anything to the goals of the ESA, *i.e.*, so long as a party prevails on a central issue he is entitled to attorneys' fees notwithstanding his lack of substantial contribution.

The Ninth Circuit rejected the Tribe's argument and held that *Ruckelshaus* only ruled that a non-prevailing party was not *eligible* to be awarded attorneys' fees. That case did not, contrary to the assertions of the Tribe, overrule cases requiring contribution by a party seeking fees.

I. The Decision Of The Ninth Circuit In This Case Does Not Conflict With *Ruckelshaus v. Sierra Club.*

The issue before the court in *Ruckelshaus v. Sierra Club* was whether a *losing* party could be awarded at-

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[3] The Ninth Circuit rejected the Tribe's first argument and, thus, never reached the Tribe's second issue.

torneys' fees under the Clean Air Act when that party had advanced the purposes of the Act. The court held that a losing party is not eligible to receive attorneys' fees notwithstanding his contribution to the goals of the Act. *Ruckelshaus* did not hold, as contended by Petitioner, that a prevailing party is automatically entitled to an attorney's fee as a matter of law. That is a fatal flaw in the Petitioner's argument.

Ruckelshaus did not disrupt existing care law requiring a party to make a contribution. Thus, after *Ruckelshaus*, in order for a fee award to be deemed "appropriate", a party must not only prevail but he must also make a contribution.

The heart of the Tribe's Petition for certiorari is its argument that *Ruckelshaus* requires that a prevailing party be awarded an attorney's fee as a matter of law. This argument was rejected by the Ninth Circuit because there is nothing in *Ruckelshaus* to support it. Pet. App. 13, 14. By the same token, this petition for certiorari, which is based on the same argument, should be denied.

To award an attorney fee to a prevailing party "as a matter of law" flies in the face of the *Ruckelshaus* opinion wherein the court indicated that lower courts should have *discretion* in making fees awards:

> We do not mean to suggest that private parties should be treated in exactly the same manner as governmental entities. *Differing abilities to bear the cost* of legal fees and *differing notions of responsibility for fulfilling the goals of the Clean Air Act* likely would justify exercising special care regarding the award of fees against private parties. 103 S. Ct. 3285, n. 12. Emphasis supplied.

II. The Ninth Circuit's Decision Does Not Conflict With Decisions Of Other Circuits.

In order to find some basis for review by this court, Petitioner argues that the Ninth Circuit's decision conflicts with cases decided by the District of Columbia

Court of Appeals and the Third Circuit Court of Appeals. Petitioner's position is that those courts have promulgated two standards: one for prevailing parties (who are entitled to attorneys' fees as a matter of law) and another for losing parties (who must contribute to the goals of the particular environmental act at issue).

Petitioner argues that in *Environmental Defense Fund v. Environmental Protection Agency*

> "no mention whatsoever was made of the substantial contribution test in the decision awarding attorneys' fees."

Pet., 19. Therefore, Petitioner reasons, a prevailing party must automatically be entitled to attorneys' fees. Petitioner fails to recognize that in *EDF v. EPA* the government did not contest the eligibility of EDF for an attorneys' fee award:

> Although EPA does argue that EDF's claims should be rejected for lack of adequate documentation . . . there is no real claim that EDF is not entitled to some amount of attorneys' fees. 672 F.2d 47, n. 2.

It would be highly unusual for a court to discuss the "appropriateness" issue where the party liable for the payment of fees has, in essence, stipulated that fees are appropriate. It should also be noted that *EDF v. EPA* is devoid of any suggestion that attorneys' fees should be awarded to a party who has not made a contribution toward the goals of the Act.

The Petitioner would have this court promulgate a new rule requiring a "losing" party to pay attorneys' fees whenever a "prevailing" party [4] *raises* an ESA issue,

---

[4] In the instant case, the Respondents prevailed on all issues litigated against the Petitioner. *Carson-Truckee Water Conservancy District v. Watt*, 537 F.Supp. 106 (D. Nev. 1982). Respondents did not prevail on the issue it litigated against the government regarding the quantity of water needed for the fish species. But,

regardless of whether that party ultimately makes any contribution toward the goals of the Act. Such a rule would not only overrule all existing case law regarding attorneys' fee awards, but would promote parasitic litigation by parties, and attorneys, only interested in obtaining fees without making a significant contribution toward the enforcement of environmental statutes.

The Petitioner's argument that the courts have set up two separate standards is frivolous and was carefully analyzed by the Ninth Circuit and rejected. The cases cited by Petitioner from the D.C. and the Third Circuit reveal that only one standard has evolved:

> . . . we believe our opinion makes clear that we have articulated *one* standard for appropriateness, and that standard allows courts to award attorneys' fees to parties who have "substantially contributed" to the goals of the . . . Act. 672 F.2d 42, n. 10 (emphasis in original).

This court should be especially skeptical of the motives of intervenors who attempt to extract large fees from litigation without making a substantial contribution. As was noted in *Alabama Power Co. v. Gorsuch*, an intervenor has a burden to show some "unique contribution:"

> If ever an intervenor can recover attorneys' fees from a party on whose side it participated . . . the justification would have to be a clear showing of some unique contribution of the intervenor to the strength of that party's legal position.

It is submitted that an intervenor should make a "unique contribution" regardless of the party from whom he seeks attorneys' fees.

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as found by the district court (which finding has never been challenged) this issue did not substantially contribute to ESA goals, Pet. App. 6.

III. There Are Additional Reasons For Affirming The Decision Below.

The district court and the Ninth Circuit held that it was not "appropriate" to award the Petitioner attorneys' fees in this case. Neither court was, thus, required to reach the alternative ground for denial of attorneys' fees raised by the respondents, i.e., that the Tribe did not comply with statutory prerequisites.

The Petitioner relies on 16 USC § 1540(g)(4) which provides:

> The court, in issuing any final order *in any suit*[5] *brought pursuant to paragraph (1)* of this subsection, may award costs of litigation (including reasonable attorneys' fees and expert witness fees) to any party, whenever the court determines such award is appropriate. Emphasis supplied.

"Paragraph (1)" of the subsection states that:

> any person may commence a civil suit . . . (A) to enjoin any person . . . who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof. 16 USC § 1540 (g)(1).

The statute also provides:

> No action may be commenced under subparagraph (1)(A) of this section . . . prior to sixty days after written notice of the violation has been given to the Secretary, and to any alleged violator of any such provision or regulation.

No notice of any alleged violation was ever given by the Petitioner to either the Secretary or the Respondents.

---

[5] Due to the arguments in the courts below, the Petitioner is, no doubt, very concious that it has never brought a suit pursuant to "paragraph (1)." Nevertheless, Petitioner omits important portions of this statute (*See*, Pet., 3) in an apparent attempt to avoid this argument.

In addition, no action was commenced "to enjoin" a "violation" of the Act.

The suit below was commenced by Respondents for mandamus to require the Secretary to deliver water under the provisions of the Washoe Project Act. The Respondents did not violate the ESA and agreed that the fish species were entitled to water from Stampede reservoir. The issue at trial concerned whether there was water available over and above the amount needed for the fish that could be sold for M & I purposes.

In the circumstances, the courts below could have denied attorneys' fees to the Petitioner on either of two grounds: First, that no attorney's fee was proper because the Petitioner did not commence a suit to enjoin a violation or give the notice required by the statute and, second, that attorneys' fees were not "appropriate". Both courts denied attorneys' fees on the second ground and did not reach the other ground. It is submitted that either ground was sufficient to deny attorneys' fees to the Petitioner.

IV. Awards Of Attorneys' Fees In Civil Rights Cases Are Not Relevant.

The Petitioner's final argument is that this court should apply the rules regarding awards of attorneys' fees in civil rights cases. Cases awarding attorneys' fees under Civil Rights laws are not germane, however, since they involve different considerations than cases construing environmental statutes. Generally, the *result* in a civil rights action is indicative of whether a person's civil rights were, or were not, violated. Thus, an inquiry into whether an attorney's fee is warranted in a civil rights case is entirely different from an environmental case where the *result* gives no indication as to whether a fee is "appropriate." It is not at all surprising that different tests have been applied in civil rights litigation than in environmental litigation. The civil rights cases cited by Petitioner have no bearing on this action and the courts

below correctly applied the rules developed by the D.C. Circuit in *Alabama Power*, *Sierra Club* and *EDF v. EPA*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 84-1384

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1984

PYRAMID LAKE PAIUTE TRIBE OF INDIANS,

Petitioner,

v.

CARSON-TRUCKEE WATER CONSERVANCY DISTRICT, et al.,

Respondents.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

Page(s)

Table of Authorities..... i

I. RESPONDENT'S INTERPRETATION OF THIS COURT'S DECISION IN RUCKELSHAUS v. SIERRA CLUB IN FACT TURNS RUCKELSHAUS ON ITS HEAD AND PRODUCES UNMANAGEABLE RESULTS. 1

II. RESPONDENT'S CONTENTION THAT ONLY PARTIES COMMENCING ACTIONS UNDER SECTION 11(g)(1) OF THE ESA MAY RECEIVE FEE AWARDS UNDER SECTION 11(g)(4) IS UNSUPPORTABLE. 8

III. CONCLUSION..... 12

TABLE OF AUTHORITIES

Cases Page(s)

Alabama Power Company v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982)..... 4, 8

Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42, 49 (D.C. Cir. 1982)..... 11

Metropolitan Washington Coalition for Clean Air v. District of Columbia, 639 F.2d 802 (D.C. Cir. 1981)..... 3

Cases (cont.) Page(s)

Palila v. Hawaii Department of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981)..... 5

Ruckelshaus v. Sierra Club, ___ U.S. ___, 103 S.Ct. 3274, 3279 (1983)..... 2, 3, 5, 6

Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982)..... 3, 4

Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982)..... 4, 12

Federal Legislation

Endangered Species Act, 16 U.S.C. § 1540(g)..... 1, 9

Endangered Species Act, 16 U.S.C. § 1540(g)(1)..... 9, 12

Endangered Species Act, 16 U.S.C. § 1540(g)(4)..... 9, 11, 12

Toxic Substances Control Act, 15 U.S.C. § 2618(d)..... 11

Legislative Materials

H.R. 14032, 94th Cong., 2d Sess. § 19(c)(3) (1976)..... 11

S. 3149, 94th Cong., 2d Sess., § 19(c)(3) (1976)..... 11

I. RESPONDENTS' INTERPRETATION OF THIS COURT'S DECISION IN RUCKELSHAUS v. SIERRA CLUB IN FACT TURNS RUCKELSHAUS ON ITS HEAD AND PRODUCES UNMANAGEABLE RESULTS.

Respondents in their briefs in opposition to certiorari raise a number of contentions intending only to obfuscate the real issue in this case. The real question is whether Congress, through the enactment of § 11(g) of the Endangered Species Act (and similar citizen's suit provisions of other federal environmental laws) intended to impose a substantial, exceptional contribution standard upon prevailing parties prior to the award of reasonable attorney's fees.

Congress clearly did not intend such a result. The legislative history only supports the interpretation that a prevailing party status is a sufficient

condition for an award of attorney's fees in all but unusual or exceptional cases. This result is more compelling when viewed in the proper historical context; i.e., a period when Congress intended to divise a statute for awarding fees to environmental litigants broader than any other fee statute enacted to that time. This Court in Ruckelshaus v. Sierra Club, ___ U.S. ___, 103 S.Ct. 3274, 3279 (1983), has already recognized that Congress meant to liberalize fee awards in environmental litigation as compared with, for example, federal civil rights litigation. And if that is the intended result why would Congress impose such a restrictive standard upon environmental litigants seeking fee awards when it had not done so in other contexts?

The Ninth Circuit and Respondents also fail to recognize that the substantial, exceptional contribution standard used to deny Petitioner attorney's fees evolved in the federal judicial system prior to the Ruckelshaus decision, in a period when courts had considered the fees provisions in environmental laws to allow awards to losing parties. See, e.g., Sierra Club v. Gorsuch, 672 F.2d 33 (D.C. Cir. 1982); and Metropolitan Washington Coalition for Clean Air v. District of Columbia, 639 F.2d 802 (D.C. Cir. 1981).

In that context it makes eminent sense that a stringent standard be imposed upon losing parties before allowing an award of fees, to avoid frivolous litigation and parasitic intervention. And while that standard has received a substantial measure of

criticism,[1/] it did serve as a basis for courts to deny fee awards to losing parties in a majority of cases and grant them in a selected few. Compare Village of Kaktovik v. Watt, 689 F.2d 222 (D.C. Cir. 1982), with Sierra Club v. Gorsuch, supra.

In contrast, there has been no uncertainty or confusion demonstrated by courts over awards to prevailing or partially prevailing parties. See

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1/See Alabama Power Company v. Gorsuch, 672 F.2d 1 (D.C. Cir. 1982)(J. Wilkey, dissent). When the Court of Appeals for the District of Columbia stated that it had articulated "one standard of appropriateness, and that standard allows courts to award attorneys' fees to parties who have 'substantially contributed' to the goals of the . . . Act" it was attempting to resolve the confusion regarding the circumstances under which losing parties would receive fee awards rather than imposing the standard on both losing and prevailing parties. See Sierra Club v. Gorsuch, 672 F.2d at 42, n.10.

Palila v. Hawaii Department of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981) (affirming an award of attorney's fees under the ESA without imposition of a substantial, exceptional contribution standard).

Moreover, this Court in Ruckelshaus clearly intended to avoid needless, wasteful inquiries into the nature of a prevailing party's contribution in all cases but where the success was trivial or purely procedural in nature. Ruckelshaus, 103 S.Ct. at 3279, n.9.

The result Petitioner's urge is practical and workable. Given this Court's distaste for seemingly endless litigation over attorney's fee awards, a sentiment shared by Congress, the interpretation of Ruckelshaus which the Ninth Circuit and Respondents advocated must be rejected. Yet Respondents make no

effort to conceal the confusion and waste their result would perpetuate:

> Ruckelshaus did not disrupt existing care [sic] law requiring a party to make a contribution. Thus, after Ruckelshaus, in order for a fee award to be deemed "appropriate," a party must not only prevail but he must also make a contribution.

Brief In Opposition for State of Nevada, p.5. It was, in fact, this "case-by-case scrutiny by federal courts" which this Court sought to avoid once and for all by its decision in Ruckelshaus 103 S.Ct. at 3279.[2/]

[2/] Contrary to Respondent's claim, Petitioner does not confuse eligibility with entitlement. See Brief in Opposition of Carson-Truckee Water Conservancy District and Sierra Pacific Power Company, p.6. Ruckelshaus makes no reference whatsoever to a distinction between eligibility for and entitlement to an award of attorney's fees. After Ruckelshaus there is little doubt that prevailing parties are (cont.)

From the outset of this litigation Petitioner has taken an active, extensive role in the protection of two species of fish threatened with imminent extinction. The fact that Petitioner's active, extensive involvement in the litigation -- through which it ultimately prevailed -- achieved the objectives of the ESA should result in an award of fees to Petitioner under the Ruckelshaus decision.[3/]

[2/](cont.)entitled to an award absent exceptional circumstances. The result Respondents urge -- namely, that winning parties are merely eligible for an award -- would subvert the intent of the statute and be repugnant to the decision in Ruckelshaus.

[3/]Respondents claim that Petitioner is merely in the litigation for its own pecuniary benefit. Nothing could be further from the truth. The fact that Petitioner may ultimately establish a commercial fishery as a valid exercise of its treaty (cont.)

Because of the Petitioner Tribe's status as an intervenor, questions of possible overlap of efforts, if any, relating to the litigation of ESA issues might exist. See, e.g., Alabama Power Company v. Gorsuch, 672 F.2d 1, at 2, 3 (9th Cir. 1983). However, this status should only be considered by the district court on remand in determining the amount of fees awarded, rather than a basis to deny fees outright.

II. RESPONDENTS' CONTENTION THAT ONLY PARTIES COMMENCING ACTIONS UNDER SECTION 11(g)(1) OF THE ESA MAY RECEIVE FEE AWARDS UNDER SECTION 11(g)(4) IS UNSUPPORTABLE.

By its use of the word "commence" Congress clearly did not intend § 11(g)

3/(cont.) rights if two species are removed from the endangered and threatened status does not diminish the valuable efforts Petitioner has made in achieving the objectives of the ESA.

of the ESA, 16 U.S.C. § 1540(g), to be interpreted and applied so narrowly as to allow fee awards only to parties literally filing suit under the Act. A far more reasonable and supportable interpretation is that parties "commencing" or initiating the enforcement of the ESA should receive fee awards if they prevail in their efforts.

First, the statute clearly endorses actions "to enjoin any person" from violations of the Act. 16 U.S.C. § 1540(g)(1). The context of this case, albeit somewhat different from traditional ESA enforcement suits, left Petitioner Tribe with no alternative but to intervene as a defendant. The alternative of awaiting the outcome of the suit with the possibility of having to sue to enjoin the sale of water if

Respondents prevailed would have been unduly risky.

Significantly, Respondents have never in the course of this litigation challenged Petitioner's standing to raise or litigate ESA issues. Moreover, despite the fact that the Secretary first raised the ESA as a defense, it only made sense for Petitioner to intervene and likewise raise the same defense. And, as alluded to in its petition for writ of certiorari, Petitioner's suspicion that its interests would not be adequately represented was ultimately confirmed by actions of the Secretary subsequent to commencement of the action.

Second, the attorney's fee provision of the ESA provides for an award of fees and costs to "any party." 16 U.S.C. § 1540(g)(4). In the context of an

identical fees provision of the Toxic Substances Control Act, 15 U.S.C. § 2618(d) Congress interpreted the phrase "any party" to "mean the parties seeking to enforce the rights granted by this section and can include an intervenor, or a defendant in some cases. . . ." (Emphasis added.) S. 3149, 94th Cong., 2d Sess., § 19(c)(3) (1976); H.R. 14032, 94th Cong., 2d Sess. § 19(c)(3) (1976), quoted in Environmental Defense Fund v. Environmental Protection Agency, 672 F.2d 42, 49 (D.C. Cir. 1982).

Significantly, while ruling on other grounds, the district court below expressed in its decision the view that Respondent's narrow construction of § 1540(g)(1) and (4) had no merit. See Pet. App. 7. The more liberal interpretation advocated by Petitioner would truly effectuate the purposes of

the ESA and congressional intent. See Village of Kaktovik v. Watt, 689 F.2d at 225.

III. CONCLUSION

With changing administrations and policies, the enforcement and implementation of federal law is all too often left to the political whim of officials not concerned with the long term objectives of those laws. Through the enactment of federal environmental legislation Congress has attempted to chart a long-term course for protecting the environment; those goals should not be allowed to be subverted by agency whim. Hence, the role of the "private watchdog" has been accorded an important status by Congress in the federal enforcement scheme. Petitioner effectively played the role of the private watchdog in this case and

ultimately prevailed in enforcing the objectives of the ESA. For these efforts, the ESA supports a reasonable award of attorney's fees upon remand to the district court.

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